83-683

NO.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1983

GERALD BANKSTON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal of Florida,
Third District

[redacted]

Steven D. Ginsburg

GINSBURG, NAGIN, ROSIN
& GINSBURG, P.A.
Attorneys for Petitioner
1570 Madruga Avenue
Coral Gables, Florida 33146-3075
Penthouse Suite
(305) 665-0595

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE LOWER COURT DECIDED CONSTITUTIONALLY SIGNIFICANT AND FREQUENTLY RECURRING QUESTIONS CONCERNING THE BALANCE BETWEEN THE POLICE'S AUTHORITY TO SEIZE AND SEARCH SUSPICIOUS PERSONS AND THEIR LUGGAGE AT AIRPORTS USING AGGRESSIVE AND VIOLENT DOGS, AND THE CITIZENS' FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO SECURITY AND PRIVACY IN BOTH THEIR PERSON AND THEIR HAND HELD LUGGAGE.

A.

WHETHER THE PROCEDURES USED BY POLICE IN SEIZING SUSPECTED NARCOTICS COURIERS AND THEIR HAND HELD LUGGAGE IN AIRPORTS AND SEARCHING THEM WITH UNLEASHED, VIOLENT AND AGGRESSIVE NARCOTIC DETECTION DOGS CONSTITUTES AN INVESTIGATIVE INTRUSION OF CITIZENS' FOURTH AND FOURTEENTH AMENDMENT RIGHTS WHICH EXCEEDS THE MINIMAL JUSTIFIABLE LIMITS BECAUSE THEY FAIL TO MINIMIZE THE RISK OF HARM AND FAIL TO UTILIZE THE MOST EXPEDITIOUS PROCEDURES AVAILABLE.

B.

WHETHER DETENTION OF A CITIZEN PENDING A DOG SNIFF CONSTITUTES AN UNREASONABLE SEIZURE WITHIN THE MEANING OF THE FOURTH AND FOURTEENTH AMENDMENTS

C.

WHETHER A NARCOTICS DOG SNIFFING OF A CITIZEN'S HAND HELD LUGGAGE CONSTITUTES A VIOLATION OF THAT CITIZEN'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES.

II.

WHETHER THE LOWER COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT BY RELIEVING THE STATE OF FLORIDA OF ITS BURDEN TO ESTABLISH REASONABLE SUSPICION IN ORDER TO JUSTIFY DETENTION OF A PERSON AND HIS HAND-HELD LUGGAGE.

TABLE OF CITATIONS

OTHER FEDERAL COURT CASES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, reversing the Florida trial court's granting of the Defendant's Motion to Suppress and two Supplemental Motions to Suppress, is reported at State v. Bankston, 435 So.2d 269 (Fla. 3d DCA 1983).

JURISDICTION

On June 7, 1983, the District Court of Appeal of Florida, Third District, filed its official opinion in State v. Bankston, 435 So.2d 269 (Fla. 3d DCA 1983). Motion for Rehearing was timely filed and denied on August 15, 1983. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code §1257 (3) and Amendments IV and XIV of the United States Constitution. Pursuant to Sup. Ct. R. 21 (b) the caption of the case in the District Court of Appeal of Florida as well as this Court, contains the names of all parties to these proceedings.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of criminal law and search and seizure issues. Article 1, §12, Florida

Constitution. The constitutional issues herein were presented and fully argued at all levels of the proceedings below. See, (R. 53-54, 72-73, 79-81) (Motions to Suppress); State v. Bankston, 435 So.2d 269 (Fla. 3d DCA 1983); Appendix.

CONSTITUTIONAL OR STATUTORY PROVISIONS

I. Amendment IV, United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

II. Amendment XIV, United States Constitution

"All persons born naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

III. Article 1, §12, Florida Constitution

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution."

STATEMENT OF THE CASE

INTRODUCTION

Petitioner, Gerald Bankston, was the Defendant in the trial court, the Appellee in the Florida District Court of Appeal, and will be referred to hereinafter as Petitioner. Respondent/Appellant, the State of Florida, was the Plaintiff in the trial court, the Appellant in the Florida District Court of Appeal, and will be referred to hereinafter as the State. The trial court is the Criminal Division of the Circuit Court, Eleventh Judicial Circuit, in and for Dade County, Florida, and will be referred to hereinafter as the trial court.

The Record of pleadings filed below in this case will be cited to hereinafter by use of the symbol "R.," while the separately bound Record of court reporter's transcripts will be cited to by use of the symbol "T."

Appellant's initial brief in the Florida District Court mistakenly entitled "Brief of Appellee" will be referred to as "Brief of Appellee [sic]."

All emphasis by underscoring has been supplied unless the contrary is specifically indicated. Emphasis by bold face type denotes emphasis this Court has placed in it's decisions by italicizing.

THE PROCEEDINGS BELOW

This is an appeal taken by Petitioner/Appellee below, Gerald Bankston, from a final decision rendered by the District Court of Appeal of Florida, Third District in favor of Appellant, the State of Florida and reversing the Order of the trial court, the Criminal Division, Circuit Court, Eleventh Judicial Circuit, in and for Dade County, Florida granting, (R. 112), Petitioner's pretrial Motion to Suppress, (R. 53-54), and two Supplemental Motions to Suppress, (R. 72-73, and 79-81), based upon the police's illegal and unconstitutional seizure and search of Petitioner's hand held suit bag from his actual, exclusive and physical custody, control and possession. (T. 171-172).

Petitioner was accused by

information filed on August 10, 1982, with (I) Trafficking in Cocaine in violation of Section 893.135, Florida Statutes and (II) Possession with Intent to Sell Cocaine in violation of Section 893.13, Florida Statutes. (R. 6-7A). Petitioner filed a Motion to Suppress on August 24, 1982 which, along with two Supplemental Motions to Suppress, were granted pre-trial by the trial court on September 28, 1982. (R. 53-54, 72-73, 79-81, 112). The federal questions presented for review here were all raised in said motions and ruled upon favorably to Petitioner in the trial court, however, subsequently were adversely ruled upon by the Florida District Court of Appeal, Third District. The Florida District Court of Appeal reviewed the order of the trial court in its published decision of June 7, 1983. State v. Bankston, 435 So.2d 269 (Fla. 3d DCA 1983). Timely filed, a Petition for

Rehearing was denied on August 15, 1983. See Appendix. This Petition directly followed.

THE FACTS AS ADDUCED BELOW

On April 6, 1982, Detective Johnson of the Metro Dade Police Department detained Petitioner Gerald Bankston at the Miami International Airport based solely upon an observation (undisclosed by record testimony) that Johnson had made, and in order to "run a dog on the suitcase that he was carrying." (T. 8). At that point, Petitioner's airplane ticket had already been taken from him. (T. 55). Detective Johnson had simultaneously detained a Mr. Peterson who apparently consented to a luggage search which resulted in Johnson's acquisition of hashish and marijuana from Peterson. (T. 9). Petitioner was detained along with his suitcase, and was not free to leave. (T. 10, 11). During the time subsequent to his detention, Petitioner's suitbag was on the ground "by where he was sitting." (T. 10).

Petitioner had expressly indicated his refusal to consent to a search of his luggage as proposed by Detective Johnson. (T. 11).

After Petitioner had been detained, Detective Johnson "explained the options that he [Petitioner] had:"

> The options were that he can give me consent, that he did not have to give me consent to look in the bag; but that if he did not give me consent that I was going to get a narcotics sniffing dog and I was going to run the suitcase with the narcotics sniffing dog." (T. 12).

Thus, the only "alternative" was for Petitioner to consent to a search of his suitcase by Detective Johnson or to remain until Johnson brought the dog by to sniff it. (T. 12). Petitioner had no other option of leaving. (T. 12).

A narcotics sniffing dog was brought

to Petitioner and his hand carried luggage in a room approximately 25 feet by 30 feet in size. (T. 16). Detective Johnson was on the other side of said room in relation to Petitioner and his luggage, (T. 16), and directed the dog to various objects throughout the room including, inter alia, an ashtray and a cabinet. (T. 18). According to Johnson:

> I then, as I was saying, "find it," move my hand in the direction I want the dog to move and heed specific points as I was going through the room, to wit: the cabinet, the ashtray, and whatever I wanted him to search with his nose. (T. 19).

When the dog was brought to the room where Petitioner and his hand held suit bag were located, Petitioner was told by the officer to move away from his suit bag. (T. 10). The Florida appellate court found the

suit bag was "a foot or two away" from Petitioner at the time of the dog sniff. State v. Bankston, 435 So.2d at 270. Thereafter, the officer commanded that the dog "find it," and directed the dog to the only suit bag in the 25' x 30' room: Petitioner's suit bag. (T. 16, 53). The dog normally is used while conducting line-ups of more than one bag or object. (T. 54-55). There was no such line-up in this case. (T. 55). At the time of the dog sniff, another police officer in the same room, Detective Dozier, possessed the marijuana and hashish allegedly obtained from the aforesaid Mr. Peterson. (T. 17). The dog did not alert to the presence of those narcotics in the officer's possession, and this fact was not included in the subsequent affidavit for search warrant. (T. 17). The dog's alert did not occur even though the other officer was in the immediate vicinity of the suit

bag, and even though the dog's handler directed the dog around the room to various objects and the dog had allegedly been told by specific command to look for narcotics. (T. 18). According to the handler, "the dog is supposed to follow my command and search where I want it to search." (T. 19). The dog specifically was not directed to Detective Dozier because, according to Detective Johnson:

> "We don't run people with the dog, even suspects for narcotics, only in the fact that the dog would injure people if they would alert to them because it is a very aggressive response." (T. 53).

The dog handler further testified he wanted the dog "to search with his nose", "the suitcase of Mr. Bankston." (T. 19). The dog alerted to Petitioner's suitcase by scratching and biting at it. (T. 12, 13).

Thereafter, Petitioner was arrested, at the airport. (T. 26). He and his suit bag were first transported to an office at 7925 N.W. 12th Street, some distance west of the Miami International Airport, where they remained for several hours, and then, Petitioner and his luggage were transported to the second floor of the Public Safety Department building some distance on the east side of the airport. (T. 35, 134). During this time Petitioner had no access to his suit bag. (T. 35). Petitioner was not in possession of his suit bag at the time of the search and for some time prior thereto. (T. 10, 32).

Before the trial court, the State agreed that there is a distinction to be drawn between hand carried items and baggage relinquished to airport carousels. (T. 156). The State further conceded Petitioner's right to privacy in his luggage. (T. 166). The trial judge then specifically determined

that the suit bag was a part of Petitioner's person, by virtue of his manucaption thereof. (T. 168-169).

Detective Johnson authored the affidavit for search warrant and the search warrant in this case by himself, without going to a prosecutor. (T. 27). A judge approached by Johnson was given and signed only one search warrant, not the two required by Section 933.11, Florida Statutes (1981). (T. 28, 29). None of the pages of either the affidavit for, or, the search warrant itself were initialed. (T. 28), and (R. 85-95). No place in either the affidavit or the warrant is it alleged that the events therein occurred in Dade County, Florida. (T. 26), and (R. 85-95). Neither the affidavit nor the warrant even allege the Miami International Airport as the location of the events therein described. (T. 26), and (R. 85-95). Neither of these documents describes the

person to be searched as required by Section 933.04, Florida Statutes (1981). (T. 30), and (R. 85-95). Petitioner was never given a copy of the search warrant which was directed to the Public Safety Department (T. 56-57, 170) (R. 92).

The trial court took judicial notice that there is no entity called the Public Safety Department, there is no Director of such a department, and that Bobby Jones, Director of the Metro-Dade Police Department, is not the duly elected Sheriff of Metropolitan Dade County. (T. 118-119). Art. VIII, §1, Florida Constitution. The search warrant sub judice is directed to the Sheriff and officers of the non-existent Public Safety Department, (R. 92, 93), and no others. No evidence was ever presented to the trial court concerning what relationship, if any, exists among the Public Safety Department, the Sheriff of Metropolitan Dade

County, the Metro-Dade Police Department, and the persons serving the warrant.

The trial court indicated it was original-ly going to grant the Motion to Suppress based upon the failure of the warrant to be issued in duplicate, and also the failure of the warrant to ever be delivered to Petitioner. (T. 170) The trial court further found "numerous things that bothers [sic] me here" with respect to the search warrant: (T. 170):

1. Use of an ancient form referring to nonexistent public entities;
2. The warrant was partially typed, partially hand-written;
3. The affidavit and warrant failed to mention where the events occured, or vaguely did so; and
4. The warrant was for a "generalized search."

Moreover, the trial court significantly determined that "We're dealing

with something that he's holding in his hand. That is a part of his person." (T. 169).

The District Court of Appeal, over objections by Petitioner (as more fully set forth in Argument II, Infra), made factual observations and determinations that Detective Johnson's testimony was uncontradicted and that Petitioner made certain state-ments not testified to in this Record of testimony and, upon those determinations, held there existed founded suspicion to detain Petitioner for purposes of exposing him and his luggage to a narcotics dog. State v. Bankston, 435 So. 2d at 269 n.1, 270-271.

ARGUMENT

I.

THE LOWER COURT DECIDED CONSTITUTIONALLY SIGNIFICANT AND FREQUENTLY RECURRING QUESTIONS CONCERNING THE BALANCE BETWEEN THE POLICE'S AUTHORITY TO SEIZE AND SEARCH SUSPICIOUS PERSONS AND THEIR LUGGAGE AT AIRPORTS USING AGGRESSIVE AND VIOLENT DOGS, AND THE CITIZENS' FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO SECURITY AND PRIVACY IN BOTH THEIR PERSON AND THEIR HAND HELD LUGGAGE.

The lower court's decision perspicuously implicates important federal constitutional and public policy considerations arising out of the continually repeated attempts of the federal and state judiciary to balance the carefully, limited authority of police to seize suspicious persons and their luggage at airports, and then subject them to a search conducted by an

unleashed, violent and aggressive narcotics detection dog, and the citizens' Fourth and Fourteenth Amendment rights in both the security and health of their persons, and the security and privacy of their hand-held luggage. State v. Bankston, 435 So.2d 269 (Fla. 3d DCA 1983). Although this Court has recently addressed in dictum some of the federal constitutional issues raised by the use of dogs in the seizure and search of suspected narcotics couriers, Florida v. Royer, 460 U.S._____, 103 S. Ct. 1319 (1983); and United States v. Place, _____U.S. _____, 103 S.Ct. 2637 (1983), this Court has not directly resolved all of the significant and recurring Fourth and Fourteenth Amendment questions raised in that context by the lower court's decision. Compelling reasons exist why this Court should issue clear and definitive guidelines for the exercise by police of their limited authority to seize

citizens and their hand held luggage, and to subsequently subject them to a search by an unleashed, violent and aggressive dog. Such guidance not only is required by the numerous federal and state trial and appellate courts faced on a regular basis with the difficult and delicate task of balancing governmental interests in providing effective law enforcement and the citizens' interest in preserving his federal constitutional rights to security and privacy, but is required equally by police officers who at the street level wish to provide their communities with effective but not constitutionally overreaching law enforcement, and by citizens whose rights to be secure in their persons and property are potentially subjected to these ever increasing governmental intrusions. Among the unresolved questions posed by the lower court's decision are:

A.

WHETHER THE PROCEDURES USED BY POLICE IN SEIZING SUSPECTED NARCOTICS COURIERS AND THEIR HAND HELD LUGGAGE IN AIRPORTS AND SEARCHING THEM WITH UNLEASHED, VIOLENT AND AGGRESSIVE NARCOTIC DETECTION DOGS CONSTITUTES AN INVESTIGATIVE INTRUSION OF CITIZENS' FOURTH AND FOURTEENTH AMENDMENT RIGHTS WHICH EXCEEDS THE MINIMAL JUSTIFIABLE LIMITS BECAUSE THEY FAIL TO MINIMIZE THE RISK OF HARM AND FAIL TO UTILIZE THE MOST EXPEDITIOUS PROCEDURES AVAILABLE.

"In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." United States v. Place, ___U.S. _____,____, 103 S.Ct. 2637, 2641 (1983). "When the nature and extent of [an investigative] detention are minimally intrusive of an individual's Fourth Amendment

interest," however, this Court has recognized that "opposing law enforcement interests can support a seizure based on less than probable cause." Id. at 2642. Under such circumstances this Court has held "that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry [v. Ohio, 392 U.S. 1 (1968)] and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope." Id. at 2644. The instant case presents the question of what are the constitutional limits and scope of the police's authority to detain an individual, his hand held luggage, or both for the purpose of exposing them to a search by an unleashed, violent and aggressive narcotics detection dog?

This Court has always considered that the fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances. United States v. Chadwick, 433 U.S. 1, 9 (1977). Since an intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent, United States v. Place, _____U.S. at _____,103 S.Ct. at 2643, the instant case, presents the important federal question of the constitutionality of the methods and procedures utilized in exposing an individual and his detained luggage to a trained narcotics dog with admittedly violent and aggressive propensities. According to the dog's handler, Detective Johnson, "We don't run people with the dog,...in the fact that the dog would injure people." (T. 53).

In United States v. Place, ____U.S.

at_____, 103 S. Ct. at 2642, this Court felt that seizing the luggage of a traveler was supported by a substantial governmental interest to pursue further investigation in the face of a reasonable belief the luggage contained narcotics. In outlining the apparent parameters of such an intrusion this Court stated, "the police may confine their investigation to an on-the-spot inquiry - for example, immediate exposure of the luggage to a trained narcotics detection dog - or transport the property to another location." Id. at 2644. The example given by footnote, Id. at 2644, n. 10, referred to this Court's decision in Florida v. Royer, 460 U.S._____, 103 S.Ct. 1319 (1983). In Florida v. Royer, supra, this Court assumed that the use of dogs in the investigation would not have entailed any prolonged detention of either Royer or his luggage which might involve other Fourth Amendment concerns. However, in

that case "the State [had] not touched on the question whether it would have been feasible to investigate the contents of Royer's bags in a more expeditious way," that being the use of a dog. Id. at 1328. As this Court stated, "There is no indication here that this means was not feasible and available. ... Indeed, it may be that no detention at all would have been necessary." The case sub judice presents an opportunity to review the feasability of dog-sniffing procedures in the presence of a detained individual. The record below unequivocably demonstrates that the trained narcotics dog is, in the words of his trainer, never brought to people to carry out a "canine-sniff" due to the dog's aggressive and violent propensities upon reacting positively. (T. 53). The Ninth Circuit Court of Appeals has already found it constitutionally unpalatable to utilize dogs to sniff people, rather than objects. United

States v. Beale, 674 F.2d 1327, 1336, n. 20 (9th Cir. 1982). Nevertheless, the case sub judice presents the precise situation where such a dog was brought to a room with a detained person and his luggage, and permitted to stalk the room unleashed and uncontrolled other than by voice commands until its probing proboscis resulted in its scratching, biting and muzzling luggage no more than two feet from its possessor's hand, which is less than the distance from one's hands to the ground. In light of this Court's recognition in United States v. Place, supra, that the luggage could have been transported to another location for the purpose of the dog-sniff, and in light of this Court's suggestion in Florida v. Royer, supra, and confirmation in United States v. Place, supra, that it is not necessary to detain the person, but only his luggage, and in light of this Court's demand in Michigan

v. Summers, 452 U.S. 692, 702 (1981), that the police minimize the risk of harm to citizens, such potentially dangerous procedures as used sub judice must be reviewed by this Court to determine whether they are constitutionally unreasonable. This is so particularly because of this Court's recognition in United States v. Place, supra, that the luggage could have been transported to another location away from the suspect for exposure to the admittedly dangerous dog.

Significantly, the trial court sub judice expressly found that Petitioner's luggage was so closely related to him as to be considered a part of his person. (T. 168-169). See, State v. Franklin, 249 P.2d 520, 521 (Wy. 1952) (Something being held or carried by an individual is so intimately a part of that person's body that the striking of it constitutes striking the person's body, and is, therefore, a battery). Hence, under

the trial court's finding, this Court should consider whether the act of bringing the trained narcotics detection dog to sniff a hand held piece of luggage, which because it is hand held is legally and intimately a part of the person's body, is the functional and constitutional equivalent of having the dog sniff the person, and whether such a dog sniff is constitutionally unreasonable when the dog is violent and aggressive. The trial court sub judice best phrased this important federal question as: "We're dealing with something that he's holding in his hand. That is a part of his person. That's within his possession....Can we have dogs walking around sniffing every person in the terminal, just at random?" (T. 169).

Exceptions to the warrant requirement have been "jealously and carefully drawn" where the public interests require some flexibility in it's application,

and such public interests outweigh reasons for prior recourse to a neutral magistrate. Arkansas v. Sanders, 442 U.S. 751, 759 (1979). This case presents the first opportunity for this Court to jealously and carefully delineate the constitutional limitations upon the methods and procedures used by the police in exposing people and their effects to dog sniffs which may be the most recently created exception to the warrant requirement.

Moreover, the reach of each exemption from the warrant requirement has been limited to that which is necessary to accommodate the identified needs of society. Arkansas v. Sanders, 442 U.S. at 760. One such need is personal security and should be addressed by this Court in the face of testimony sub judice that narcotic dogs, if run on people, would injure them.

The reasonableness requirement of

the Fourth Amendment requires that for seizures permitted on less than probable cause, the scope thereof must be carefully tailored to its underlying justification. Florida v. Royer, _____U.S. at _____, 103 S. Ct. at 1325. In Florida v. Royer, _____ U.S. at ____, 103 S. Ct. at 1325, this Court in stating that "the investigative methods employed should be the least intrusive means reasonably available," established that "the predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect." This Court further recognized that "there are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention." Florida v. Royer, ____U.S. at ___, 103 S. Ct. at 1328.

Hence, this Court has addressed in

United States v. Place, supra, the possibility of having to transport luggage to another location, and in Florida v. Royer, supra, the possibility of transporting a seized individual elsewhere, both for purposes of safety and security, as well as facilitating an investigatory detention for dog sniffing procedures. Therefore, in the case sub judice, this Court should consider all of the testimony by the police officer charged with the responsibility of handling dog-sniff procedures at the Miami International Airport: "We don't run people with the dog, even suspects for narcotics, only in the fact that the dog would injure people if he would alert to them because it is a very aggressive response." (T. 53). From such testimony it is clear that although there may indeed be a reasonable method for accomplishing a short detention for dog sniffing procedures to be accomplished on luggage by

bringing the luggage to the dog, which is kept nearby on the airport apron, State v. Bankston, 435 So.2d at 270 (Fla. 3d DCA 1983), this Court may consider it constitutionally unreasonable to do the converse and bring the dog to the person. This Court should also resolve whether bringing the dangerous dog to the person violates either the minimally intrusive procedure requirement, or the reasonably free from danger to personal safety and security requirement.

Remaining for this Court to answer is the significant constitutional question of whether the government's transporting an unleashed dog to a room and simply, as here, commanding the dog to "find it," giving the animal carte blanche to roam the room where a suspect and his luggage are detained within a foot of one another is an unreasonable method due to the risk created to the person's

health and well-being should the dog attack as his trainer warned. Also unanswered is the constitutional question of whether, on the other hand, bringing a detained suspect's luggage to the dog is not only reasonable, but also the most minimally intrusive method of accomplishing the dog sniff. As in United States v. Mendenhall, 446 U.S. 544, 550 (1983), "There is no question in this case that the respondent possessed this constitutional right of personal security as she walked through the Detroit Airport." Consequently, the constitutional question ripe for this Court's adjudicaiton sub judice is whether the luggage should be brought to the dog or vice versa when the personal security and well-being of a citizen are at stake.

"An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the

stop." Florida v. Royer, 460 U.S. at _____, 103 S. Ct. at 1325. As noted in United States v. Place, ____U.S. at ____, 103 S. Ct. at 2645, "Particularly in the case of detention of luggage within the traveler's immediate possession, the police conduct intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary. The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage." In the instant case, however, the subject was not free to continue as he was detained along with his luggage. Had the police simply removed his luggage to the airport apron for the dog-sniff, the defendant would not have been subjected to the danger of a violent unleashed dog, "the coercive atmosphere of a custodial

confinement or to the public indignity of being personally detained." United States v. Place, _____U.S. at ____, 103 S.Ct. at 2645. This Court should consider whether by bringing the luggage to the dog, the police could have avoided any risk of harm to the Petitioner any coercive atmosphere or longer than necesary restraint on the personal liberty of the Petitioner, and, most significantly, expedited the procedure by eliminating the additional time it took to retrieve the dog, permit the dog its freedom to roam, bring the dog to the Petitioner and thereafter return the dog to its repository.

Since Terry v. Ohio, 392 U.S. at 19 (1968), "The central inquiry is the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Still unresolved by this Court's decisions but raised sub judice is the question: whether

the act of governmental agents exposing citizens to the unfettered whims of an animal with admittedly violent tendencies has any place in an ordered concept of liberty, let alone our society's constitutional scheme. Thus, this Court should grant the instant Petition and settle the important question of federal law: whether the Fourth and Fourteenth Amendments prohibit the police from taking aggressive narcotics detection dogs to sniff personally hand held luggage on less than a probable cause.

B.

WHETHER DETENTION OF A CITIZEN PENDING A DOG SNIFF CONSTITUTES AN UNREASONABLE SEIZURE WITHIN THE MEANING OF THE FOURTH AND FOURTEENTH AMENDMENTS

In United States v. Place, _____U.S. at_____, 103 S. Ct. at 2644-5, this Court concluded that the exposure of luggage,

located in a public place, to a narcotics dog does not constitute a "search" within the meaning of the Fourth Amendment. Although this Court's holding in United States v. Place, supra, that Place's detention was too lengthy to survive constitutional scrutiny, rendered it unnecessary for this Court to reach the dog sniff issue now presented here, this Court's above stated conclusion was primarily premised on the assumption that, "This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." Id. at 2644. Under the facts in the case at bar, the owner as well as the luggage having been subjected to personal danger as well as embarrassment and inconvenience, if not under arrest de facto, was so de jure, and the dog sniff, as applied here, was clearly greater than the least

intrusive method contemplated by this Court in United States v. Place, ____ U.S. at_____, 103 S. Ct. at 2645. In United States v. Place, supra, this Court preserved the technical freedom of the traveler whose luggage, but not whose person, had been seized. Clearly then, the instant case raises the significant constitutional question of whether it is permissible for the police to detain a suspect during the time it takes to retrieve the narcotics detection dog and to conduct the dog sniff.

Furthermore, United States v. Place, _____U.S. at_____, 103 S. Ct. at 2645, continued the standard of "limitations applicable to investigative detentions of the person" in order to "define the permissible scope of an investigative detention of the person's luggage on less than probable cause." That standard since Terry v. Ohio, supra, has always been detention for the

purpose of questioning. Brown v. Texas, 443 U.S. 47, 51 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 881-882 (1975); Florida v. Royer, 460 U.S. at _____, 103 S. Ct. at 1324. Thus, the constitutional inquiry for this Court to now focus upon is whether dog sniffing is the constitutional equivalent of questioning and thereby falls within the rubric of the present exception to the Fourth Amendment, or whether a new exception to the Fourth Amendment has been created and is in need of refinement. This Court should likewise consider whether the detention to which the instant Petitioner was subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity. Florida v. Royer, 460 U.S. at ____, 103 S. Ct. at 1326.

C.

WHETHER A NARCOTICS DOG SNIFFING OF A CITIZEN'S HAND HELD

LUGGAGE CONSTITUTES A VIOLATION OF THAT CITIZEN'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES.

There is a substantial and unsettled federal question regarding the veracity of the position that dog sniffs are not per se searches because they consist of nothing more than the smelling of molecules of public air. The United States Court of Appeals, First Circuit, interprets this Court's decisions along the lines of Terry v. Ohio, supra, to hold that "the degree of intrusiveness of stops that do not rise to the level of arrests may vary, and in order to be lawful in a given case it must be proportional to the degree of suspicion that prompted the intrusion." United States v. Berryman, 706 F.2d 1241, 1248, (1st Cir. 1983). As a result, the First Circuit permits detention of a traveler's luggage upon reasonable suspicion for exposure to a detection dog,

due to what they perceive is "the minimal nature of the intrusion." United States v. Regan, 687 F.2d 531, 536-7 (1st Cir. 1982). However, that Court distinguished detention of luggage for dog sniffs from the detention of luggage owners for such a purpose. Id. at 537. While accepting the former, the Court impliedly rejected the latter. Id.

The United States Court of Appeals, Second Circuit has held that "canine identification is a non-intrusive, discriminating and ... reliable method of identifying packages containing narcotics," and therefore is "neither a search nor seizure for purposes of the Fourth Amendment." United States v. Waltzer, 682 F.2d 370, 372-3 (2d Cir., 1982). The Second Circuit conceded that "The Ninth Circuit has recently ruled otherwise and stated that the reasoning of our prior cases 'seems to have [been] rejected' by the Supreme Court." Id.

at 373, citing United States v. Beale, 674 F.2d 1327, 1331 (9th Cir. 1982).

In disagreeing with the Ninth Circuit, the Second Circuit attempted to rationalize as follows:

> Odor is extrinsic to the luggage, which is not opened, and the sniffing discloses only contraband, not other items in the bags. The owner is not subjected to the inconvenience and possible humiliation entailed in other less discriminate and more intrusive methods. Sniffing results in virtually no annoyance and rarely even contact with the owner of the bags, unless the scent is positive, in which case, as we hold, probable cause has been established. The only privacy intruded on is thus the secret possession of contraband. Id. at 373.

The Second Circuit obviously was not called upon to address the issue sub judice of the luggage owner's being subjected to the dog, the accompanying danger, inconvenience or humiliation.

Likewise, the Seventh Circuit Court of Appeals has ruled that "the use of canines to sniff inanimate objects for contraband does not constitute an unlawful search..." United States v. Klein, 626 F.2d 22, 26 (7th Cir. 1980). Again however, the Seventh Circuit does not address the question of dog sniffs of people, but rather only resolves the issue as to their luggage. Moreover, the Seventh Circuit does not unequivocably rule, as did the Second Circuit, that dog sniffs are not searches; rather they conclude that the sniff as a search is not "unlawful." Id.

On the other hand, the Ninth Circuit Court of Appeals has interpreted this Court's decision in United States v. Chadwick, 433 U.S. 1, 11 (1977), to elevate personal luggage to the Fourth Amendment status accorded private residences. United States v. Beale, 674 F.2d 1327, 1332 (9th Cir. 1982). The Ninth Circuit held that the use

of narcotics dogs on "personal luggage is a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant" on founded suspicion. Id. at 1335. Significantly, the Ninth Circuit notes that "the use of dogs to sniff people, rather than objects, is highly intrusive and is normally inconsistent with the concepts embodied in our Constitution. Id. at 1336, n. 20.

Jones v. Latexo Independent School District, 499 F.Supp. 223 (E.D. Tex. 1980) held the use of dogs for sniffing out narcotics constitutes a search. The court there reasoned that it was of no moment that the dog only sniffed exterior molecules of air and stated that the same could be said of the sound waves picked up by the electric "bug" in Katz v. United States, 389 U.S. 347 (1967). Id. at 233. This creates an inherent and unavoidable conflict with the fulcrum for all of this Court's prior

decisions concerning luggage: that important Fourth Amendment privacy interests manifest the expectation that luggage's contents remain free from public examination. United States v. Chadwick, 433 U.S. at 11. Previously, this Court's decisions pertaining to luggage unanimously concluded that luggage contents are not open to public view, except as a condition to a border entry or common carrier travel. Id. at 13. The practical effect of dog sniffing procedures is to open the luggage to public view, or at least the view of the dog and its police handler. "And as we observed in that case [United States v. Chadwick, supra], luggage is a common repository for one's personal effects, and therefore is in-evitably associated with the expectation of privacy." Arkansas v. Sanders, 442 U.S. 753, 762 (1979). The concurring opinion therein observed:

> Whether arrested in a hotel lobby, an airport, a railroad terminal, or on a public street, as here, the owner has the right to expect that the contents of his luggage will not, without his consent, be exposed on demand of the police. Id. at 767.

In this regard, examination of the Florida appellate court decision which formed the basis of the trial court's decision to grant the instant Petitioner's motion to suppress, clearly reveals that, at least until Florida v. Royer, supra, the Florida appellate court believed there existed a Fourth Amendment right to privacy against a dog sniff, where luggage is removed by police from the defendant's personal custody. Sizemore v. State, 390 So.2d 401, 404 (Fla.3d DCA 1980) stated and then held as follows:

> Without the defendant's valid consent, it would have been practically impossible for the briefcase to have been presented to the trained narcotics dog for an olfactory

> inspection. Consequently, the resolution of the question of an invasion of the defendant's Fourth Amendment right to privacy in this case is governed by his valid consent to the dog sniff.
>
> * * *
>
> The pivotal factor in this case was that Sizemore had a thirty-minute interval, while awaiting the arrival of the dog and its handler, to reflect upon his impending plight. The police officers accorded him the right to refuse a direct search of his briefcase and he had a reasonable expectancy that they would accord him the same freedom against a canine sniff.

This Court in Florida v. Royer, ___U.S. at ___, 103 S. Ct. at 1323, paralleled the holding in Sizemore v. State, supra, by holding, "it is unquestioned that without a warrant to search Royer's luggage and in the absence of probable cause and exigent circumstances, the validity of the search depended on Royer's purported consent."

In the case sub judice, the

defendant had an almost identical thirty minute detention period, but this defendant had expressly refused to consent to a dog sniff. Nevertheless, the same Florida court which decided Sizemore v. State, supra, held below that "since both [the defendant] and his hand-luggage had already been properly seized, the precise location of either during the period of lawful detention is constitutionally insignificant." State v. Bankston, Id. at 271. That Court so reasoned because, "Having thus properly restrained the defendant, the police then, with astonishing foresight, did just what the Supreme Court later stated [in Florida v. Royer, supra] they were justified and entitled to do: they held Bankston while awaiting the arrival of a narcotics dog." Id at 271. Petitioner has respectfully submitted to this Court the inherent unreasonableness of holding him personally for exposure to an unrestrained

and violent animal. While narcotics traffic presents a clear and present danger to our nation, this Court is the only bastion to prevent our citizenry from being subjected to the equal danger of physical harm from violent animals and their overzealous police handlers. Clearly a balance must be reached between these interests by this Court.

Petitioner respectfully submits that this Court never implied nor did it intend to imply in Florida v. Royer, supra, that people (as opposed to their luggage) could be held for a narcotics dog. Even if the dicta in Florida v. Royer, supra, could have been so interpreted, this is only because, as this Court noted therein that there was "no indication here that this means was not feasible and available." The testimony of dog-handler Detective Johnson sub judice clearly dispels any notion that the method is feasible, let alone reasonable, when applied

to a person vis a vis his effects. Therefore, it is respectfully requested that this Court grant the within Petition to decide whether the limitation of Terry v. Ohio, supra, to detention for questioning ought to be extended to include detention for dog sniffing, and to what extent.

II.

WHETHER THE LOWER COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT BY RELIEVING THE STATE OF FLORIDA OF ITS BURDEN TO ESTABLISH REASONABLE SUSPICION IN ORDER TO JUSTIFY DETENTION OF A PERSON AND HIS HAND-HELD LUGGAGE.

"It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Florida v. Royer, 460 U.S. at _____, 103 S. Ct. at 1326.

In the instant case the State of Florida asserted below that "[A]ppellee and his suitcase were properly being detained by the police." (Brief of Appellee [sic] at 11). For this factual statement the State of Florida cited to "T-153." (Brief of Appellee [sic] at 11). See Appendix. Petitioner

maintains that neither that nor any other portion of the Record on Appeal supported the State's factual assertion and that the lower appellate court erroneously relied upon this statement in setting forth what it percieved to be the facts of this case. As a result, the lower court utilized its own version of the facts to conclude that Petitioner's detention was justified, State v. Bankston, 435 So.2d at 270, even though the Record on Appeal was void of such a finding by the trial court. It is submitted that absent support in the Record, the lower court, by submitting such a finding has created conflict with this Court's decisions in Florida v. Royer, supra, and United States v. Mendenhall, 446 U.S. 544, 557 (1980). Ironically, in Florida v. Royer, supra, the State of Florida objected to similar free-lance factual forays by the same Florida appellate court en banc. See Florida v.

Royer, Brief of Petitioner [State] on Jurisdiction at pages 14, 15, 17. See Appendix.

Petitioner has consistently objected to this action by the State and the Florida appellate court and said objection is exemplified by Petitioner's/Appellee's Motion for Rehearing in the Florida appellate court:

> 1. This Court characterized "the generally familiar theme" of facts in this case (in footnotes 1 and 4 of its opinion) as being derived from the "uncontradicted testimony of Sgt. Johnson." In this regard this Court overlooked or failed to consider that all inferences and facts coming to this Court are to be construed in a light most favorable to Appellee. Shapiro v. State, 390 So.2d 344, 346 (Fla. 1980). Detective Johnson's internally conflicting testimony and the affidavit for search warrant introduced into evidence in the lower court clearly show that the alleged statement by Appellee "if I have something, why don't you let me flush it in the john?" did not occur. (T. 48).

> Appellee renews its objections made in its Brief of Appellee at pages 4 and 23 to consideration of facts dehors the record in this case, particularly the lack of any record of evidence or testimony regarding the detention of Appellee, and would point out that Detective Johnson testified Appellee's detention was based only upon observations he made, and not upon the alleged statements about head stash and flushing same. (T. 8).

A thorough review of the context of the Record reveals that at no time did the trial court make a factual finding or legal determination that the Petitioner, and his hand held suit bag were legally detained. (T. 152-156). Instead such a review of the Record reveals that the trial court, in an attempt to accomodate the prosecutor in his legal argument, assumed arguendo that the police had the right to detain Petitioner. (T. 152-156). The trial court having found Petitioner's lack of consent controlling,

never had to determine that the police legally stopped Petitioner or had the right to do so.

Even assuming arguendo that the trial court made a factual finding and legal determination that the police had the right to detain Petitioner, there is not even a scintilla of evidence in the Record to support such a conclusion. It was the State's responsibility as Appellant below to provide a complete record, and the Florida appellate court was mistaken in substituting, in the absence of such a finding, its view of the evidence. United States V. Mendenhall, 446 U.S. at 557. The State at best merely cited to the alleged conclusion of the trial court, but cited to no evidence in the Record that even establishes why Petitioner was detained (e.g. testimony by Johnson about what specific observations he made), let alone that such detention was legally

justified and constitutionally permissible. The State cited to none, because there was none.

The legal issue before the trial court, and now before this Court, is whether or not the police's seizure of Petitioner's hand held suitbag from his actual, physical and exclusive custody, possession and control was legally justified and constitutionally permissible. An important question of federal law yet to be answered is how the allegedly legal detention of Petitioner would authorize the warrantless pre-arrest seizure of his suit bag from his actual, exclusive and physical control, custody and possession.

Thus the Florida appellate court decision which usurps the responsibility placed upon the government to establish the facts proving the reasonableness of the search and seizure directly conflicts with this Court's decisions creating that very

same burden of proof. Consequently, this Court should accept juisdiction of this case to correct this conflict and to remind all federal and state appellate courts of the long standing principles that the trial court's factual determinations should not be supplanted by the appellate court's version in resolving the constitutional propriety of a search and seizure.

CONCLUSION

Wherefore, based upon the significant federal constitutional questions raised by the lower court's decision, the conflicts herein expressed between the decision of the lower court and the decisions of this Court, the conflicts enumerated as existing and creating confusion between the various Federal Circuit Courts of Appeal, and the citations of authority set forth, it is respectfully submitted that this Court should exercise its jurisdiction over this matter of compelling national importance.

Respectfully submitted,

GINSBURG, NAGIN, ROSIN & GINSBURG
A Professional Association
1570 Madruga Avenue
Penthouse Suite
Coral Gables, Florida 33143-3075
(305) 665-0595

By: _____
Steven D. Ginsburg, Esquire

NO.

IN THE
SUPREME COURT of the UNITED STATES

October Term, 1983

GERALD BANKSTON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

State of Florida)
) ss AFFIDAVIT OF SERVICE
County of Dade)

1. My name is Steven D. Ginsburg and I am an attorney at law licensed to practice and admitted tc the Bar of this Court on January 19, 1981.

2. I represent the Petitioner before this Court, Gerald Bankston, in his Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District.

3. Pursuant to Sup. Ct. R. 20, I

calculated the time for filing said Petition for a Writ of Certiorari to be 60 days from the August 15, 1983 denial of rehearing by the District Court of Appeal of Florida, Third District, to wit: October 14, 1983.

4. On October 14, 1983 40 copies of said Petition for Writ of Certiorari were duly deposited in a United States post office, with first-class postage prepaid, and addressed to the Clerk of the Supreme Court of the United States, First and Maryland Avenue, N.E. Washington, D.C. 20543.

5. On October 14, 1983 3 copies of said Petition for a Writ of Certiorari were duly served on the only opposing party, the State of Florida, through its counsel, the Attorney General of Florida, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.

6. To my knowledge these mailings took place pursuant to Sup. Ct. R. 28.2 on October 14, 1983 within the permitted time.

FURTHER AFFIANT SAYETH NOT.

By:_____
Steven D. Ginsburg, Esquire

Sworn to and subscribed before me this 14th day of October, 1983.

_____
Notary Public, State of Florida
at Large
My commission expires:

APPENDIX

Cite as 389 So.2d 389 (Fla.App. 3 Dist. 1980)

junction to prevent the threatened breach of that duty where the remedy at law is inadequate, was correctly granted in the first place and should not have been vacated.

I would grant certiorari and direct the trial court to reinstate the protective order.

JORGENSON and FERGUSON, JJ., concur in the dissent of DANIEL S. PEARSON, J.

The STATE of Florida, Appellant,

v.

Gerald BANKSTON, Appellee.

No. 80-2155.

District Court of Appeal of Florida, Third District.

June 7, 1988.

Rehearing Denied Aug. 15, 1988.

Defendant charged with cocaine trafficking moved to suppress the fruits of a search of his luggage. The Circuit Court, Dade County, Murray Goldman, J., granted the motion and State appealed. The District Court of Appeal, Schwartz, C.J., held that narcotics officers had founded suspicion of criminal conduct warranting detention of defendant at airport for five to 15-minute period required to obtain dog to check defendant's luggage for drugs where, upon being told that officers were looking for narcotics, defendant became faint, name on defendant's identification and name on his plane ticket did not match, and defendant asked officers that, if he had "something," why didn't they let him "flush it in the john."

Reversed.

Arrest ⇐63.5(3)

Narcotics officers had founded suspicion of criminal conduct warranting detention of defendant at airport for five to 15-minute period required to obtain dog to check defendant's luggage for drugs where, upon being told that officers were looking for narcotics, defendant became faint and asked to sit down, name on defendant's identification and name on his plane ticket did not match, and defendant asked officers that, if he had "something," why didn't they let him "flush it in the john."

Jim Smith, Atty. Gen., and Wilson Thomas, Asst. Atty. Gen., for appellant.

Ginsburg, Nagin, Rosin & Glassberg and Stephen Rosin, Coral Gables, for appellee.

Before SCHWARTZ, C.J., and BARKDULL and NESBITT, JJ.

SCHWARTZ, Chief Judge.

In our first review of a Miami International Airport narcotics stop and search since the United States Supreme Court decision in *Florida v. Royer*, — U.S. —, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), affirming *Royer v. State*, 389 So.2d 1007 (Fla. 3d DCA 1980) (en banc), rev. denied, 397 So.2d 779 (Fla.1981), we reverse an order of suppression on the authority of that decision.

This particular variation of the generally familiar theme began[1] when two plain-clothes narcotics officers, Johnson and Dozier, became interested in Bankston and his companion, Peterson, because they appeared "extremely nervous"[2] in the airport.

1. The facts stated are those in the uncontradicted testimony of Det. Johnson. *See State v. Mitchell*, 377 So.2d 1000 (Fla. 3d DCA 1979).

2. No other characteristic of the drug courier profile was noted or relied upon. Such fact

reason and because founded suspicion was based upon other non-profile indicia, we do not have occasion nor desire to [illegible] *Royer*, 389 So.2d at 1017, n. 6 that "a conformance, without more [n.s.], to one or more elements of the profile does not amount to articulable susp-

When they "approached" the appellee, see *Florida v. Royer*, supra, — U.S. at —, 103 S.Ct. at 1322, 75 L.Ed.2d at 236; *Lagle v. State*, 394 So.2d 189 (Fla. 3d DCA 1981), as he was nearing his departure gate, and asked for his ticket and identification, Bankston voluntarily complied. The names on the two documents did not match. Johnson then asked permission to look inside a suitcase he was carrying. When the defendant asked him what he was after, Johnson stated that he and his partner were narcotics officers, looking for drugs. Bankston at once became faint and asked to sit down. After he was taken to a nearby seating area, the defendant then asked "if I have something, why don't you let me flush it in the john?," to which Johnson responded that if all he had was a "hand stash, that we would indeed likely allow" him to do so. At that point, Bankston was informed that he was "being detained."

He and Peterson were again asked to consent to a search of their checked and carry-on baggage. Although Peterson agreed, Bankston did not, and Johnson, as he had indicated, went to secure a narcotics dog from its pen on the apron of the airport. When the dog arrived some five to ten minutes later, he alerted on the [illegible] bag which had been moved a foot or two away from Bankston to accommodate the sniff. Based on the probable cause which had then arisen, *Florida v. Royer*, — U.S. at —, 103 S.Ct. at 1325, 75 L.Ed.2d at 242; *Cavallaro v. State*, 389 So.2d 1188 (Fla. 3d DCA 1982), the defendant was arrested and a search warrant was secured for the bag. When it was executed, 185 grams of cocaine were found inside. Bankston's resulting prosecution for trafficking, however, was short-circuited by the order under review, in which the trial judge granted a motion to suppress on the authority of *Simmons v. State*, 390 So.2d 481 (Fla. 3d DCA 1980), rev. denied, 399 So.2d 1145 (Fla.1981).[1] In the newly generated light of *Florida v. Royer*, this ruling cannot stand.

We reach this conclusion by the following line of legal analysis:

1. Even putting aside the dubious effect of the observed nervousness, see *Royer v. State*, 389 So.2d at 1016, n. 4; but see *Florida v. Royer*, — U.S. at —, n. 5, 103 S.Ct. at 1326, n. 5, 75 L.Ed.2d at 234, n. 5 (Rehnquist, J. dissenting), it is clear that Bankston's fainting spell, his dual identification and especially his markedly incriminating statement about flushing "something" down the john[2] were together more than sufficient to engender the founded suspicion of criminal conduct which was required to justify his detention. As stated in the plurality opinion in *Royer*[3]

> We agree with the State that when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers—paying cash for a one-way ticket, the mode of checking the two bags, and Royer's appearance and conduct in general—were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention. [n.s.]

which established founded suspicion in this case were present there and (b) the court specifically found it unnecessary to decide whether Simmons had even been seized or detained when the consent was given. 390 So.2d at 484.

4. Indeed, although we do not so decide, the statement may have been enough to create probable cause.

5. On this issue, only Justice Brennan is arguably in disagreement. *Florida v. Royer*, — U.S. at — - —, 103 S.Ct. at 1331, 75 L.Ed.2d at 240-43 (Brennan, J., concurring).

1. We do note that the majority of the Supreme Court seems not to have reached or directly addressed that question in *Florida v. Royer*. But see — U.S. at — n. 6, 103 S.Ct. at 1326, n. 6, 75 L.Ed.2d at 234, n. 6 (Rehnquist, J. dissenting).

2. In *Simmons*, we upheld a dog-sniff of the defendant's hand luggage because, unlike the situation here, the defendant had voluntarily consented to the sniff after being advised of his right to refuse. The pertinence of *Simmons*, even pre-*Florida v. Royer*, is dubious, however, both because (a) some of the circumstances

— U.S. at ——, 103 S.Ct. at 1324, 75 L.Ed.2d at 250. *See also Harpold v. State*, 389 So.2d 270 (Fla. 2d DCA 1980), *rev. denied*, 397 So.2d 777 (Fla.1981); *Myles v. State*, 374 So.2d 53 (Fla. 3d DCA 1979); *compare Horvitz v. State*, 400 So.2d 545 (Fla. 4th DCA 1980).

2. Having thus properly restrained the defendant, the police then, with astonishing foresight, did just what the Supreme Court later stated they were justified and entitled to do: they held Bankston while awaiting the arrival of a narcotics dog. As the plurality noted

> The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage. There is no indication here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out.

— U.S. at ——, ——, 103 S.Ct. at 1327, 75 L.Ed.2d at 241-42.

In any event, we hold here that the officers had reasonable suspicion to believe that Royer's luggage contained drugs, and we assume that the use of dogs in the investigation would not have entailed any prolonged detention of either Royer or his luggage which may involve other Fourth Amendment concerns.

* * * * * *

> In the case before us, the officers, with founded suspicion, could have detained Royer for the brief period[6] during which Florida authorities at busy airports were able to carry out the dog-sniffing procedure.[7]

— U.S. at ——, n. 10, 103 S.Ct. at 1328, n. 10, 75 L.Ed.2d at 242, n. 10; *compare, Horvitz v. State*, *supra*.

6. The five-fifteen minute time span involved here obviously did not exceed that authorized, in fact actually described, in *Florida v. Royer*. The question of how long the period of detention may extend and then whether our holdings in *Young v. State*, 394 So.2d 526 (Fla. 3d DCA 1981) and *Slater v. Mosley*, 392 So.2d 602 (Fla. 3d DCA 1981) may be in jeopardy are therefore not before us. The issue is, however, now generally before the Court in *United States v. Place*, 660 F.2d 44 (2d Cir.1981), *cert. granted*, 457 U.S. 1104, 102 S.Ct. 2901, 73 L.Ed.2d 1313 (1982) (invalidating two hour detention of personal luggage to arrange dog sniff).

7. *See* note 5, *supra*.

The defendant has suggested that taking the carry-on bag from Bankston's immediate possession so that the sniff could take place was improper. It is apparent, however, that, since both he and his hand-luggage had already been properly seized, the precise location of either during the period of lawful detention is constitutionally insignificant. *Cavallaro v. State*, *supra*; *see State v. Roberts*, 415 So.2d 796 (Fla. 3d DCA 1982); *State v. Goodley*, 381 So.2d 1189 (Fla. 3d DCA 1980).

Because the conduct of the officers in effecting and conducting the search and seizure of the defendant was in accordance with the extended form of *Terry* stop approved in *Royer*, the order of suppression is

Reversed.

Michael KIELY, a minor By and Through his father and next friend, Patrick KIELY, Appellants,

v.

Lee CORTINA and Rich Cortina, Appellees.

No. 82-2052.

District Court of Appeal of Florida, Third District.

June 14, 1983.

Rehearing Denied Aug. 15, 1983.

Appeal from Circuit Court, Dade County; Leonore C. Nesbitt, Judge.

Robert L. Knoppel and Wayne Kaplan, Miami, for appellants.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1983

MONDAY, AUGUST 15, 1983

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 82-2198
GERALD HAMLETON,	**	
Appellee.	**	
	**	

Upon consideration, appellee's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By _____
Deputy Clerk

cc: Stephen V. Rosin
Jim Smith

/srb

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

STATE OF FLORIDA, Appellant, vs. GERALD BANKSTON, Appellee.	CASE NO. 82-9047 MOTION FOR REHEARING OR CLARIFICATION, ALTERNATIVELY FOR REHEARING EN BANC, AND ALTERNATIVELY FOR STAY OF MANDATE

Appellee, Gerald Bankston, by and through his undersigned attorneys, pursuant to Fla. R. App. P. 9.330, moves this Court to rehear or clarify its decision in this cause, alternatively, to grant rehearing en banc of its decision herein pursuant to Fla. R. App. P. 9.331, and alternatively for stay of mandate and in support thereof submits:

1. This Court characterized "the generally familiar theme" of facts in this case (in footnotes 1 and 4 of its opinion) as being derived from the "uncontradicted testimony of Sgt. Johnson." In this regard this Court overlooked or failed to consider that all inferences and facts coming to this Court are to be construed in a light most favorable to Appellee. Shapiro v. State, 390 So.2d 344, 346 (Fla. 1980). Detective Johnson's internally conflicting testimony and the affidavit for search warrant introduced into evidence in the lower court clearly show that the alleged statement by Appellee "if I have something, why don't you let me flush it in the john?" did not occur. (T. 48).

Appellee renews its objections made in its Brief of Appellee at pages 4 and 23 to consideration of facts dehors the record in this case, particularly the lack of any record of evidence or testimony regarding the detention of Appellee, and would point out that Detective Johnson testified Appellee's detention was based only upon observations he made, and not upon the alleged statements about head stash and flushing same. (T. 8).

2. This Court held that "the police then, with astonishing foresight, did just what the Supreme Court later stated

FILE COPY

they were justified and entitled to do: they held Bostetter while awaiting the arrival of a narcotics dog." This Court goes on to cite portions of Florida v. Royer, ____U.S.____, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) including language therein that "there is no indication here that this means was not feasible..;" "we assume that the use of dogs would not...involve other Fourth Amendment concerns." This Court goes on to hold that the precise location of Bostetter and his hand-luggage is "constitutionally insignificant." In reaching this conclusion this Court overlooked or failed to consider the testimony of Detective Johnson that, "We don't run people with the dog, even suspects for narcotics, only in the fact that the dog would injure people if they would alert to them because it is a very aggressive response." (T. 53). Thus the method by which the dog sniff was conducted and the location of Appellee's luggage cannot humanly be deemed "reasonable" within the ambit of the Fourth Amendment, and must ergo, be constitutionally significant.

4. This Court in reaching the conclusion that the warrantless pre-arrest seizure of Appellee's hand held luggage was "constitutionally insignificant," has also overlooked or failed to consider that all of this Court's prior decisions, relied upon as authority for this conclusion, regarded dog-sniffs of luggage, in which the owners either had abandoned their expectation of privacy either by placing or checking their luggage with various airlines or on carousels, or consented to the dog sniff. See Cavaliani v. State, 409 So.2d 1160, 1110 (Fla. 3d DCA 1982); State v. Roberts, 415 So.2d 796 (Fla. 3d DCA 1982); and, State v. Goodier, 381 So.2d 1189 (Fla. 3d DCA 1980). Whereas, the luggage in this case was never turned over to an airline but was in the personal and physical possession of the Appellee, and Appellee never consented to the dog sniff sub judice.

5. The Court has overlooked or failed to consider Florida Statute Section 901.151(5) (1981) which is coextensive with the scope of federal law regulating "Terry-stops," and which limits pre-arrest warrantless seizures to seizures of weapons or evidence found during a pat down for weapons. No

weapon was seized sub judice and no pat down conducted.

6. Alternatively, should this court deny rehearing or clarification, Appellee moves for rehearing en banc, pursuant to Fla. R. App. P. 9.331 undersigned counsel hereby expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the decision of this Court in Simmons v. State, 398 So.2d 481 (Fla. 3d DCA 1980) and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court.

7. Only two days ago on June 20, 1983, the United States Supreme Court issued its decision affirming the reversal of conviction in United States v. Place, 660 F.2d 44 (2nd Cir. 1981), aff'd, _____U.S._____(Opinion issued June 20, 1983). In that decision that Court has apparently elaborated its dictum in Florida v. Royer, supra, regarding dog sniffs. Since the luggage in United States v. Place, 660 F.2d at 46, was taken from the physical custody of the defendant rather than from the custody of the airlines, the United States Supreme Court's decision will most assuredly have a significant impact on this case. Unfortunately, however, undersigned counsel has not been able to obtain a copy of the two day old decision, and would therefore, respectfully request that at the very least this Court stay its decision on this alternative motion for rehearing or rehearing en banc, and stay the issuance of the mandate until Appellee has an opportunity to supplement this motion with reference to this most recent opinion.

WHEREFORE, based upon the foregoing reasons and citations of authority, Appellee requests this Court grant rehearing or clarify its decision, alternatively grant rehearing en banc, or alternatively stay the mandate in this case until the recent decision of the United States Supreme Court may be reviewed and argued.

Respectively submitted,

GINSBURG, MAGIN, ROSIN & GINSBURG
A Professional Association
1570 Madruga Avenue - Penthouse
Coral Gables, Florida 33146
(305) 665-0595
Attorneys for Appellee

By_____
STEPHEN V. ROSIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of June, 1983, to the office of Paul Rendelson, Assistant Attorney General, Ruth Bryan Owen Rohde Building, Florida Regional Service Center, 401 N.W. 2nd Avenue, #820, Miami, Florida 33128.

By_____
STEPHEN V. ROSIN

IN THE CIRCUIT COURT OF THE [illegible] JUDICIAL CIRCUIT, IN FLORIDA
IN AND FOR DADE COUNTY

THE STATE OF FLORIDA, Plaintiff,	CASE NO. [illegible]-90-7 JUDGE MURRAY GOLDEN
vs.	MOTION TO SUPPRESS
GERALD BANKSTON, Defendant.	

The defendant, GERALD BANKSTON, by and through his undersigned counsel, moves this Court to suppress as evidence allegedly taken from him in this cause, a gray-black suitbag, a white powdery substance and leather jacket allegedly found therein, and any statements made by the defendant subsequent to his detention, and would state:

1. The defendant was detained without a founded or reasonable suspicion in violation of his rights under the 4th and 14th Amendments to the United States Constitution and Article 1, Section 12 of the Florida Constitution.

2. A search warrant was issued in this cause and is facially and fatally defective for violating the requirements of the 4th and 14th Amendments of the United States Constitution, Article 1, Section 12 of the Florida Constitution, and Sections 933.02, 933.04, 933.05, 933.06, 933.07, 933.12, 933.13, 933.14 Florida Statutes (1981), to wit:

a. The warrant fails to specify location of the events alleged therein;

b. The warrant was issued subsequent to and not prior to the search and seizure of the defendant and/or the property alleged above;

c. The warrant is based upon a false statement;

d. The warrant is not based upon reliable information;

e. The warrant would not have been issued but for a previously unconstitutional and illegal arrest without probable cause, and is presumptively tainted by an illegal arrest. Wong Sun v. United States, 371 U.S.471, 83 S.Ct. 407 (1963).

3. The return of said search warrant failed to comply with Section 933.12 to the prejudice of the defendant, to wit:

a. There is no witness that can account for material discrepancies with respect to the execution of said search warrant and the property receipt given the defendant;

b. The custodian of the defendant's property acknowledged receipt of property from the defendant he had not in fact received;

c. Evidence relating to the chain of custody and lack of tampering with said evidence allegedly returned pursuant to said warrant has been destroyed.

4. The search warrant was allegedly based upon a canine sniff of the defendant's property, said dog sniff being the product of:

a. An illegal stop and arrest of the defendant;

b. Illegally obtained statements of the defendant, taken admittedly without Miranda warnings but subsequent to detention;

c. An unreliable canine.

WHEREFORE, the Defendant requests this Court enter its Order Supressing the above described property and any statements made by the Defendant in this cause .

Respectfully submitted,

GINSBURG, MAGIN & ROSIN , P.A.
Penthouse
1570 Madruga Avenue
Coral Gables, Florida 33146
305/665-0595

By: _____
Steven D. Ginsburg
Counsel for Defendant

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been hand-delivered to Assistant State Attorney Charlton Stamer, 1351 NW 12 Street this 24th day of August, 1982.

_____

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

THE STATE OF FLORIDA,

Plaintiff,

vs.

GERALD BAMBTON,

Defendant.

Honorable Murray Goldman

Case No. 82-9847

SUPPLEMENTAL MOTION TO SUPPRESS

The defendant, GERALD BAMBTON, by and through his undersigned counsel, moves this Court to suppress as evidence allegedly taken from him in this cause all items described on the attached property receipt (Exhibit A) and previously described in his Jan. 14, 1983 Motion to Suppress which the instant motion hereby supplements, and in support thereof states:

1. The search warrant which was allegedly issued in this cause directs the police to seize "the Property" which had already been unreasonably seized and removed from its location where found without a warrant and without probable cause.

2. The search warrant is constitutionally overbroad in that it fails to adequately specify the property to be seized, thereby leaving the scope of the seizure to the discretion of the executing officer. Perrello v. State, 390 So.2d 97 (Fla. 3d DCA 1980).

3. The search warrant affidavit fails to particularly describe the location of the events alleged therein thereby:

a. failing to allege the jurisdiction of the Court to issue same;

b. failing to state probable cause for the issuance of same;

c. violating Sections 933.01, 933.04, 933.06 Florida Statutes.

4. Neither the search warrant nor a copy thereof was delivered to the defendant as required by Section 933.11 Florida Statutes in order for said warrant to be properly executed.

5. The defendant was not particularly described as the person to be seized although mandated by Section 933.04 Florida Statutes which states: "...no search warrant shall be issued

except upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the person and thing to be seized."

6. The defendant was seized in violation of the search warrants directive in that at the time of said warrant's execution, the defendant was not in possession of "the Property" described therein:

7. The search warrant is invalid because it was based upon a dog sniff that was not consented to by the defendant and the suitcase's presentation to the narcotics dog invaded the defendant's Fourth Amendment right to privacy as well as his constitutional right under Article I Section 23 Florida Constitution. Rivmore v. State, 390 So.2d 401 (Fla. 3d DCA 1980).

8. The search warrant is invalid as it's execution and service are directed to non-existent persons and non-existant entities:

a. There is no Public Safety Department, Dade County; and

b. There is no Director of the alleged Public Safety Department who is also known as the Sheriff of Metropolitan Dade County; and

c. Bobby Jones, the Director of the Metro-Dade Police Department is not the duly elected Sheriff of Dade County, Florida pursuant to Article VIII Section 1 Florida Constitution.

WHEREFORE, the Defendant requests this Court enter its Order Suppressing the above and hereinafter described property.

Respectfully submitted,

GIMBURG, MAGIN & ROSIN
A Professional Association
1570 Madruga Avenue
Penthouse
Coral Gables, Florida 33146

By _____
Steven D. Ginsburg

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Supplemental Motion to Suppress was forwarded to the Office of the State Attorney, 1351 N.W. 12th Street, Miami, Florida 33125 on this the 15th day of September, 1983.

By _____
Steven D. Ginsburg

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

THE STATE OF FLORIDA,

Plaintiff,

vs.

GERALD BANKSTON,

Defendant.

Honorable Murray Goldman

Case No. 82-9047

SUPPLEMENTAL MOTION TO SUPPRESS

The defendant, GERALD BANKSTON, by and through his undersigned counsel, moves this Court to suppress the search warrant itself, and all evidence allegedly obtained as a result of said warrant in this cause to wit: all items described on the attached property receipt (Exhibit A) and previously described in his August 24, 1982 Motion to Suppress which the instant motion hereby supplements, and in support thereof states:

1. The defendant was already in custody having been arrested by officers of the Metro-Dade Police Department when the police applied for and received a search warrant in this cause.

2. The application for search warrant after his arrest constituted a critical stage of the prosecution of the defendant within the language of United States v. Wade, 388 U.S. 218, (1967), at which the defendant was:

a. entitled to be present; and

b. entitled to counsel

3. Without the defendant being given any opportunity to, or actually having counsel present, the application for search warrant, the issuance thereof and its subsequent execution constituted a denial of the defendants rights to counsel, confrontation and cross-examination under the Sixth and Fourteenth Amendments of the United States Constitution.

4. The defendant has been prejudiced by the foregoing in that as a result thereof:

a. evidence material to the defendant's defense was lost, destroyed and tampered with; and

(7)

b. omission of material facts from the warrants supporting affidavit may have had an influence on the judge issuing the warrant and directly reflected on the unreliability of the canine who provided the basis for the warrant's issuance; and

c. false statements in the affidavit for search warrant should and could have been brought to the attention of the judge.

5. At the time of the application for search warrant, the investigation was no longer a general inquiry but had focused upon the defendant and in reality was accusatory, giving rise to a violation of the defendant's Sixth Amendment rights. Escobedo v. Illinois, 378 U.S. 478, 485 (1964).

6. Counsel is essential at post-arrest search warrant applications just as counsel is essential at post-arrest lineups to avoid suggestiveness where possible. The suggestiveness in this case is apparent when the affiant on the search warrant affidavit omitted the fact that the narcotics dog failed to detect other narcotics present and in the possession of a police officer in close proximity to the "premises" sniffed and allegedly alerted upon.

7. There was no exigent circumstance requiring a denial of the foregoing Sixth Amendment rights. Therefore the method of obtaining the search warrant and its subsequent execution were unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, the Defendant requests this Court enter its Order Suppressing the above and hereinafter described property, and the search warrant.

Respectfully submitted,

GINSBURG, MAGIN & ROBIN
A Professional Association
1370 Madruga Avenue
Penthouse
Coral Gables, Florida 33146

By: _____
Steven M. Ginsburg

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Supplemental Motion to Suppress was forwarded to the Office of the State Attorney, 1351 N.W. 12th Street, Miami, Florida 33125 on this the 27th day of September, 1982.

By _____
Steven J. Glassman

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY FALL TERM, 1982

CASE NUMBER 82-9847

STATE OF FLORIDA,

Plaintiff,

vs.

GERALD BAMLETON,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE having come on to be heard upon the Defendant's Motion to Suppress, the Court having heard argument of counsel and being fully advised in the premises, it is hereby

ORDERED that the Defendant's Motion is granted, for reasons stated in the transcript.

DONE AND ORDERED at Miami, Dade County, Florida, this 1 day of October, 1982.

JUDGE BURKAY GOLDMAN
CIRCUIT COURT JUDGE
CRIMINAL DIVISION

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 82-0047

THE STATE OF FLORIDA,

Appellant,

vs.

GERALD BANKSTON,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

BRIEF OF APPELLEE

JIM SMITH
Attorney General
Tallahassee, Florida

PAUL HENDELSON
Assistant Attorney General
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N.W. 2nd Avenue, #820
Miami, Florida 33128
(305) 377-5441

THE TRIAL COURT ERRED IN SUPPRESSING THE EVIDENCE IN THE INSTANT CAUSE AS SIZEMORE v. STATE, 390 So.2d 481 (Fla. 3rd DCA 1980) IS INAPPLICABLE TO THE INSTANT CAUSE.

Assuming arguendo that the appellee had proper standing to object, which the appellant vigorously denies he in fact had, the trial court none the less erred in granting the motion to suppress based on its interpretation of Sizemore v. State, supra.

In Sizemore, relied upon by the court in support of its order granting the motion to dismiss, the defendant was not being detained by the police. Indeed, up until the time the dog alerted on Sizemore's suitecase, the defendant would have been free to depart company with the police and continue on his way. Obviously, because there was no detention of the person in Sizemore, nor would any detention have been proper under the facts of that case, the only way the police could have gotten the suitcase from possession of the defendant to the nose of the dog would have been through consent.

Contrary to the facts in Sizemore, the appellee and his suitcase were properly being detained by the police. Further, the court ruled that the detention was proper T-153, and the appellee has not appealed that ruling.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,

THIRD DISTRICT

CASE NO. 83-0047

THE STATE OF FLORIDA,

Appellant,

vs.

GERALD BARRETON,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA, CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

STEPHEN V. ROSIN, Esquire
GINSBURG, MAGIN, ROSIN & GINSBURG
A Professional Association
Counsel for Appellee
Penthouse Suite
1570 Madruga Avenue
Coral Gables, Florida
33146-3075
(305) 665-0595

hypothesizing proper detention, assuming it arguendo, presuming it for the sake of proceeding with a legal argument regarding what police may or may not do once they have acquired a right to detain a citizen. (T. 153-154). No construction of lines 14 through 18, (T. 153), could lead one to conclude the trial court was making a ruling at that time on the right of the police to detain Appellee. Moreover, Appellee respectfully objects to all citations to "R. 29-34" by Appellant for "facts" not testified to at the hearings transcribed for the instant Record on Appeal. (Brief of Appellee [sic] at 2-7). It is Appellant's burden to provide a complete record. Dade County Board of Public Instruction v. Foster, 307 So.2d 502 (Fla. 3d DCA 1975). Appellant has omitted any transcripts, if any exist, of evidence or testimony regarding the detention of Appellee. It is improper for Appellant to attempt to ameliorate this fatal omission by citations to nonevidentiary pleadings. This is clearly illustrated by the testimony of Detective Johnson who claimed Appellee's detention was based only upon observations he made, (T. 8), and not, as Appellant claims, upon Appellee's alleged statements about head stash and flushing same. (Brief of Appellee [sic] at 5).

Appellant has compounded its improper citations to the Record on Appeal by adding and even underlining the words "the occupation's" to the verbiage otherwise extracted verbatim from (R. 31), which actually reads: "The officer then requested to look inside the gray carry-on suitbag that defendant had in his possession." (R. 31), and (Brief of Appellee [sic] at 4, ¶ 3).

were properly being detained by the police." (Brief of Appellee [sic] at 11). For this factual statement Appellant cites to "T-153." (Brief of Appellee [sic] at 11).[14] Appellee maintains that neither that nor any other portion of the Record on Appeal supports Appellant's factual assertion.

A thorough review of the content which is covered by that and subsequent pages of the Record reveals that at no time does the trial court make a factual finding or legal determination that the Appellee and his hand held suit bag were legally detained. (T. 152-156). Instead what such a review of the Record reveals is that the trial court, in an attempt to accommodate the prosecutor in his legal argument, assumed arguendo that the police had the right to detain Appellee. (T. 152-156). The trial court never actually determined that the police legally stopped Appellee or had the right to do so.

Even assuming arguendo that the trial court made a factual finding and legal determination that the police had the right to detain Appellee, there is not even a scintilla of evidence in the Record to support such a conclusion. As noted earlier, it is Appellant's responsibility to provide a complete record. Dade County Board of Public Instruction v. Foster, 387 So.2d, at 982. Appellant at best merely cites to the alleged conclusion of the trial court, but Appellant cites to no evidence in the Record that even establishes why Appellee was detained.

[14]Appellant again complains that "(A)ppellee has not appealed that ruling." (Brief of Appellee [sic] at 11). See, p. 7, supra.

NO.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
Attorney General

CALVIN L. FOX
Assistant Attorney General
401 N.W. 2nd Avenue
(Suite 820)
Miami, Florida 33128
(305) 377-5441

was granted; extensive briefs of the parties were submitted and oral argument was subsequently heard on April 14, 1980. On September 9, 1980, in a split opinion, the District Court reversed the panel opinion and the trial court.

The en banc decision herein is identical in its structure to the dissent to the panel opinion and is authored by the dissent to the panel opinion. Indeed, the facts relied upon by the en banc court are no different than those stated above, except that the en banc court infers (on a defense appeal) from the barren record that the Defendant's ticket and license were not returned. Id at 1018. Such a factual finding and question was never presented to the trial court. This also of course, also ignores any issue of articulable suspicion to conduct a brief investigation. The fundamental position of the en banc court was simply a reweighing and different view of the facts.

The fundamental error in the en banc court reversal herein is reflected in its view of the factual question of consent found by the trial court and affirmed by the panel opinion. The en banc court opinion refers to the factual finding of consent by the trial court as THE "ALLEGED CONSENT." Id at 1019. Citing Frost, infra, the District Court en banc opinion then takes the view that any movement from the airport concourse to the room forty (40) feet away under Dunaway was an arrest. Id 1018-1019. The Court ignores any possibility of a brief detention of the Respondent for investigation by stating that the alias used by the Defendant was not a suspicious circumstance in the experience of the Court[2]. 389 So.2d at

---

2. The District Court's en banc decision and outright rejection of Johnson's experience and factual observations is absolutely refuted by the record. THE DEFENDANT WAS NERVOUS ABOUT SIXTY-FIVE (65) POUNDS OF MARIJUANA!! He was travelling under an alias to avoid detection.

United States v. Mendenhall, __U.S.___, 100 S.Ct. 1870 (1980) is contra. 389 So. 2d 1019 and 1017 n. 6. The Court concluded without viewing the facts reached by the trial court as sustained by the panel, that because the Respondent was illegally detained, his consent was therefore, automatically invalid. Id at 1018. The Court stated that there was no precedent to sustain the trial court. But see, e.g., United States v. Mendenhall, supra. On September 24, 1980, the State filed its Motion for Rehearing and Motion for Certification noting the grevious error in the en banc decision. On October 21, 1980, the State's Motion for Rehearing was denied. On March 18, 1981, the Florida Supreme Court with Justices Alderman and Adkins dissenting, denied the State's application for review of the Florida District Court's en banc decision. Al.

83 683

NO.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1983

GERALD BANKSTON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal of Florida,
Third District

APPENDIX

Steven D. Ginsburg

GINSBURG, MAGIN, ROSIN
& GINSBURG, P.A.
Attorneys for Petitioner
1570 Madruga Avenue
Coral Gables, Florida 33146-3075
Penthouse Suite
(305) 665-0595

The STATE of FLORIDA, Appellant,

v.

Gerald BANKSTON, Appellee

No. 82-2198

District Court of Appeal of Florida,

Third District.

June 7, 1983.

Rehearing Denied Aug. 15, 1983

Jim Smith, Atty. Gen., and William Thomas, Asst. Atty. Gen., for appellant.

Ginsburg, Nagin, Rosin & Ginsburg and Stephen Rosin, Coral Gables, for appellee.

Before SCHWARTZ, C.J., and BARKDULL and NESBITT, JJ.

SCHWARTZ, Chief Judge.

In our first review of a Miami International Airport narcotics stop and

search since the United States Supreme Court decision in Florida v. Royer, _____U.S._____, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), affirming, Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1980) (en banc), rev. denied, 397 So.2d 779 (Fla.1981), we reverse an order of suppression on the authority of that decision.

This particular variation of the generally familiar theme began[1] when two plainclothes narcotics officers, Johnson and Dozier, became interested in Bankston and his companion, Peterson, because they appeared "extremely nervous"[2] in the airport. When

---

[1]The facts stated are those in the uncontradicted teistmony of Sgt. Johnson. See State v. Mitchell, 377 So.2d 1006 (Fla. 3d DCA 1979).

[2]No other characteristic of the drug courier profile was noted or relied upon. Both for this reason and because founded suspicion was based upon other non-profile indicia, we do not here reexamine our dictum in Royer, 389 So.2d at 1017, n. 6 that "a conformance, without more [e.o.], to one or more elements of the profile does not amount to articulable suspicion." We do note that the majority of the Supreme Court

they "approached" the appellee, see Florida v. Royer, supra, ____U.S. at____, 103 S.Ct. at 1322, 75 L.Ed.2d at 236; Login v. State, 394 So.2d 183 (Fla. 3d DCA 1981), as he was nearing his departure gate, and asked for his ticket and identification, Bankston voluntarily complied. The names on the two documents did not match. Johnson then asked permission to look inside a suitbag he was carrying. When the defendant asked him what he was after, Johnson stated that he and his partner were narcotics officers, looking for drugs. Bankston at once became faint and asked to sit down. After he was taken to a nearby seating area, the defendant then asked "if I have something, why don't you let me flush it in the john?," to which Johnson

---

seems not to have reached or directly addressed that question in Florida v. Royer. But see____ U.S. at____ n.6, 103 S.Ct. at 1339, n. 6, 75 L.Ed.2d at 254, n.6(Rehnquist, J. dissenting).

responded that if all he had was a "head stash, that we would indeed likely allow" him to do so. At that point, Bankston was informed that he was "being detained."

He and Peterson were again asked to consent to a search of their checked and carry-on baggage. Although Peterson agreed, Bankston did not, and Johnson, as he had indicated, went to secure a narcotics dog from its pen on the apron of the airport. When the dog arrived some five-fifteen minutes later, he alerted on the suit bag which had been moved a foot or two away from Bankston to accommodate the sniff. Based on the probable cause which had thus arisen, Florida v. Royer, ____U.S. at____, 103 S.Ct. at 1325, 75 L.Ed.2d at 242; Cavalluzzi v. State, 409 So.2d 1108 (Fla. 3d DCA 1982), the defendant was arrested and a search warrant was secured for the bag. When it was executed, 185 grams of cocaine were found

inside. Bankston's resulting prosecution for trafficking, however, was short-circuited by the order under review, in which the trial judge granted a motion to suppress on the authority of Sizemore v. State, 390 So.2d 40-1 (Fla. 3d DCA 1980), rev. denied, 399 So.2d 1145 (Fla.1981).[3] In the newly generated light of Florida v. Royer, this ruling cannot stand.

We reach this conclusion by the following line of legal analysis:

1. Even putting aside the dubious effect of the observed nervousness, see Royer v. State, 389 So.2d at 1016, n. 4; but see

---

[3]In Sizemore, we upheld a dog-sniff of the defendant's hand luggage because, unlike the situation here, the defendant had voluntarily consented to the sniff after being advised of his right to refuse. The pertinence of Sizemore, even pre-Florida v. Royer, is dubious, however, both because (a) none of the circumstances which established founded suspicion in this case were present there and (b) the court specifically found it unnecessary to decide whether Sizemore had even been seized or detained when the consent was given. 390 So.2d at 404.

Florida v. Royer, ____ U.S. at ____, n.5, 103 S.Ct. at 1338, n. 5, 75 L.Ed.2d at 254, n.5 (Rehnquist, J. dissenting), it is clear that Bankston's fainting spell, his dual identification and especially his markedly incriminating statement about flushing "something" down the john[4] were together more than sufficient to engender the founded suspicion of criminal conduct which was required to justify his detention. As stated in the plurality opinion in Royer[5]

> We agree with the State that when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers--paying cash for a one-way ticket,

---

[4]Indeed, although we do not so decide, the statement may have been enough to create probable cause.

[5]On this issue, only Justice Brennan is arguably in disagreement. Florida v. Royer, ____ U.S. at ____ _ ____, 103 S.Ct. at 1331, 75 L.Ed.2d at 244-45 (Brennan, J., concurring).

> the mode of checking the two bags, and Royer's appearance and conduct in general--were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention. [e.s.]

____U.S. at ____, 103 S.Ct. at 1326, 75 L.Ed 2d at 239. See also Harpold v. State, 389 So.2d 279 (Fla. 3d DCA 1980), rev. denied, 397 So.2d 777 (Fla.1981); Myles v. State, 374 So.2d 83 (Fla. 3d DCA 1979); compare Horvitz v. State, 433 So.2d 545 (Fla. 4th DCA 1983).

2. Having thus properly restrained the defendant, the police then, with astonishing foresight, did just what the Supreme Court later stated they were justified and entitled to do: they held Bankston while awaiting the arrival of a narcotics dog. As the plurality

noted

> The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage. There is no indication here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out.

_____U.S. at_____ _ _____, 103 S.Ct. at 1327, 75 L.Ed.2d at 241-42.

> In any event, we hold here that the officers had reasonable suspicion to believe that Royer's luggage contained drugs, and we assume that the use of dogs in the investigation would not have entailed any prolonged detention of either Royer or his luggage which may involve other Fourth Amendment concerns.

* * * * * *

In the case before us, the officers, with founded suspicion, could have detained Royer for the brief period[6] during which Florida authorities at busy airports seem able to carry out the dog-sniffing procedure.[7]

____U.S. at____, n.10, 103 S.Ct. at 1328, n.10, 75 L.Ed.2d at 242, n. 10; compare, Horvitz v. State, supra.

The defendant has suggested that

---

[6]The five-fifteen minute time span involved here obviously did not exceed that authorized, in fact actually described, in Florida v. Royer. The question of how long the period of detention may extend and thus whether our holdings in Young v. State, 394 So.2d 525 (Fla. 3d DCA 1981) and State v. Mosier, 392 So.2d 602 (Fla. 3d DCA 1981) may be in jeopardy; are therefore not before us. The issue is, however, now generally before the Court in United States v. Place, 660 F.wd 44 (2d Cir. 1981), cert. granted, 457 U.S. 1104, 102 S.Ct. 2901, 73 L.Ed. 2d 1312 (1982) (invalidating two hour detention of personal luggage to arrange dog sniff).

[7]See note 5, supra.

taking the carry-on bag from Bankston's immediate possession so that the sniff could take place was improper. It is apparent, however, that, since both he and his hand-luggage had already been properly seized, the precise location of either during the period of lawful detention is constitutionally insignificant. Cavalluzzi v. State, supra; see State v. Roberts, 415 So.2d 796 (Fla. 3d DCA 1982); State v. Goodley, 381 So.2d 1180 (Fla. 3d DCA 1980).

Because the conduct of the officers in effecting and conducting the search and seizure of the defendant was in accordance with the extended form of Terry stop approved in Royer, the order of suppression is

Reversed.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1983
MONDAY, AUGUST 15, 1983

THE STATE OF FLORIDA **

Appellant, **

vs. ** CASE NO. 82-2198

GERALD BANKSTON **

Appellee. **

**

Upon consideration, appellee's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By_____
Deputy Clerk

cc: Stephen V. Rosin
Jim Smith

/srb

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

STATE OF FLORIDA, Appellant, vs. GERALD BANKSTON, Appellee.	CASE NO. 82-9047 MOTION FOR REHEARING OR CLARIFICATION, ALTERNATIVELY FOR REHEARING EN BANC, AND ALTERNATIVELY FOR STAY OF MADATE

Appellee, Gerald Bankston, by and through his undersigned attorneys, pursuant to Fla. R. App. P. 9.330, moves this Court to rehear or clarify its decision in this cause, alternatively, to grant rehearing en banc of its decision herein pursuant to Fla. R. App. P. 9.331, and alternatively for stay of mandate and in support thereof submits:

1. This Court characterized "the generally familiar theme" of facts in this case (in footnotes 1 and 4 of its opinion) as being derived from the "uncontradicted testi-

mony of Sgt. Johnson." In this regard this Court overlooked or failed to consider that all inferences and facts coming to this Court are to be construed in a light most favorable to Appellee. Shapiro v. State, 390 So.2d 344, 346 (Fla. 1980). Detective Johnson's internally conflicting testimony and the affidavit for search warrant introduced into evidence in the lower court clearly show that the alleged statement by Appellee "if I have something, why don't you let me flush it in the john?" did not occur. (T. 48).

Appellee renews its objections made in its Brief of Appellee at pages 4 and 23 to consideration of facts dehors the record in this case, particularly the lack of any record of evidence or testimony regarding the detention of Appellee, and would point out that Detective Johnson testified Appellee's detention was based only upon

observations he made, and not upon the alleged statements about head stash and flushing same. (T. 8).

2. This Court held that "the police then, with astonishing foresight, did just what the Supreme Court later stated they were justified and entitled to do: they held Bankston while awaiting the arrival of a narcotics dog." This Court goes on to cite portions of Florida v. Royer, ____U.S.____, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) including language therein that "there is no indication here that this means was not feasible..;" "we assume that the use of dogs would not...involve other Fourth Amendment concerns." This Court goes on to hold that the precise location of Bankston and his hand-luggage is "constitutionally insignificant." In reaching this conclusion this Court overlooked or failed to consider the testimony of Detective Johnson that, "We

don't run people with the dog, even suspects for narcotics, only in the fact that the dog would injure people if they would alert to them because it is a very aggressive response." (T. 53). Thus the method by which the dog sniff was conducted and the location of Appellee's luggage cannot humanely be deemed "reasonable" within the ambit of the Fourth Amendment, and must ergo, be constitutionally significant.

4. This Court in reaching the conclusion that the warrantless pre-arrest seizure of Appellee's hand held luggage was "constitutionally insignificant," has also overlooked or failed to consider that all of this Court's prior decisions, relied upon as authority for this conclusion, regarded dog-sniffs of luggage, in which the owners either had abandoned their expectation of privacy either by placing or checking their luggage with various airlines or on carousels, or

consented to the dog sniff. See Cavalluzi v. State, 409 So.2d 1108, 1110 (Fla. 3d DCA 1982); State v. Roberts, 415 So.2d 796 (Fla. 3d DCA 1982); and, State v. Goodley, 381 So.2d 1180 (Fla. 3d DCA 1980). Whereas, the luggage in this case was never turned over to an airline but was in the personal and physical possession of the Appellee, and Appellee never consented to the dog sniff sub judice.

5. The Court has overlooked or failed to consider Florida Statute Section 901.151(5) (1981) which is coextensive with the scope of federal law regulating "Terry-stops," and which limits pre-arrest warrantless seizures to seizures of weapons or evidence found during a pat down for weapons. No weapon was seized sub judice and no pat down conducted.

6. Alternatively, should this court deny rehearing or clarification, Appellee moves for rehearing en banc, pursuant to Fla.

R. App. P. 9.331 undersigned counsel hereby expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the decision of this Court in Sizemore v. State, 390 So.2d 401 (Fla. 3d DCA 1980) and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court.

7. Only two days ago on June 20, 1983, the United States Supreme Court issued its decision affirming the reversal of conviction in United States v. Place, 660 F.2d 44 (2nd Cir. 1981), aff'd, _____U.S._____(Opinion issued June 20, 1983). In that decision that Court has apparently elaborated its dictum in Florida v. Royer, supra, regarding dog sniffs. Since the luggage in United States v. Place, 660 F.2d at 46, was taken from the physical custody of the defendant rather than from the custody of the airlines, the United States

Supreme Court's decision will most assuredly have a significant impact on this case. Unfortunately, however, undersigned counsel has not been able to obtain a copy of the two day old decision, and would therefore, respectfully request that at the very least this Court stay its decision on this alternative motion for rehearing or rehearing en banc, and stay the issuance of the mandate until Appellee has an opportunity to supplement this motion with reference to this most recent opinion.

WHEREFORE, based upon the foregoing reasons and citations of authority, Appellee requests this Court grant rehearing or clarify its decision, alternatively grant rehearing en banc, or alternatively stay the mandate in this case until the recent decision of the United States Supreme Court may be reviewed and argued.

Respectively submitted,

GINSBURG, NAGIN, ROSIN & GINSBURG
A Professional Association
1570 Madruga Avenue - Penthouse
Coral Gables, Florida 33146
(305) 665-0595
Attorneys for Appellee

By_____
STEPHEN V. ROSIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of June, 1983, to the office of Paul Mendelson, Assistant Attorney General, Ruth Bryan Owen Rohde Building, Florida Regional Service Center, 401 N.W. 2nd Avenue, #820, Miami, Florida 33128.

By_____
STEPHEN V. ROSIN

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY FALL TERM, 1982

CASE NUMBER 82-9047

THE STATE OF FLORIDA

Plaintiff,

vs.

GERALD BANKSTON

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS CAUSE having come on to be heard upon the Defendant's Motion to Suppress, the Court having heard argument of counsel and being fully advised in the premises, it is hereby

ORDERED that the Defendant's Motion is granted, for reasons stated in the transcript.

DONE AND ORDERED at Miami, Dade County, Florida, this 1 day of October, 1982.

/s/
JUDGE MURRAY GOLDMAN
CIRCUIT COURT JUDGE
CRIMINAL DIVISION

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 82-9047 [sic]

THE STATE OF FLORIDA,

Appellant,

vs.

GERALD BANKSTON

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

BRIEF OF APPELLEE [sic]

JIM SMITH
Attorney General
Tallahassee, Florida

PAUL MENDELSON
Assistant Attorney General
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N.W. 2nd Avenue, #820
Miami, Florida 33128
(305) 377-5441

II.

THE TRIAL COURT ERRED IN SUPPRESSING THE EVIDENCE IN THE INSTANT CAUSE AS SIZEMORE v. STATE, 390 So.2d 401 (Fla. 3rd DCA 1980) IS INAPPLICABLE TO THE INSTANT CAUSE.

Assuming arguendo that the appellee had proper standing to object, which the appellant vigorously denies he in fact had, the trial court none the less erred in granting the motion to suppress based on its interpetation of Sizemore v. State, supra.

In Sizemore, relied upon by the court in support of its order granting the motion to dismiss, the defendant was not being detained by the police. Indeed, up until the time the dog alerted on Sizemore's suitecase, the defendant would have been free to depart company with the police and continue on his way. Obviously, because there was no detention of the person in Sizemore, nor would any detention have been proper under the facts of the case, the only way police could have gotten

the suitcase from possession of the defendant to the nose of the dog would have been through consent.

Contrary to the facts in Sizemore, the appellee and his suitcase were properly being detained by the police. Further, the court ruled that the detention was proper T-153, and the appellee has not appealed that ruling.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 82-9047

THE STATE OF FLORIDA,

Appellant,

vs.

GERALD BANKSTON,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA, CRIMINAL DIVISION.

ANSWER BRIEF OF APPELLEE

STEPHEN V. ROSIN, Esquire
GINSBURG, NAGIN, ROSIN & GINSBURG
A Professional Association
Penthouse Suite
1570 Madruga Avenue
Coral Gables, Florida
33146-3075
(305) 665-0595

hypothesizing proper detention, assuming it arguendo, presuming it for the sake of proceeding with a legal argument regarding what police may or may not do once they have acquired a right to detain a citizen. (T. 152-156). No construction of lines 14 through 18, (T. 153), could lead one to conclude the trial court was making a ruling at that time on the right of the police to detain Appellee. Moreover, Appellee respectfully objects to all citations to "R. 29-36" by Appellant for "facts" not testified to at the hearings transcribed for the instant Record on Appeal. (Brief of Appellee [sic] at 2-7). It is Appellant's burden to provide a complete record. Dade County Board of Public Instruction v. Foster, 307 So.2d 502 (Fla. 3d DCA 1975). Appellant has omitted any transcripts, if any exist, of evidence or testimony regarding the detention of Appellee. It is improper for Appellant to

attempt to ameliorate this fatal omission by citations to nonevidentiary pleadings. This is clearly illustrated by the testimony of Detective Johnson who claimed Appellee's detention was based only upon observations he made, (T. 8), and not, as Appellant claims, upon Appellee's alleged statements about head stash and flushing same. (Brief of Appellee [sic] at 5).

Appellant has compounded its improper citations to the Record on Appeal by adding and even underlining the words "the companion's" to the verbiage otherwise extracted verbatim from (R. 31), which actually reads: "The officer then requested to look inside the gray carry-on suitbag that defendant had in his possession." (R. 31), and (Brief of Appellee [sic] at 4, ¶ 2).

were properly being detained by the police." (Brief of Appellee [sic] at 11). For this factual statement Appellant cites to "T-153." (Brief of Appellee [sic] at 11). Appellee maintains that neither that nor any other portion of the Record on Appeal supports Appellant's factual assertion.

A thorough review of the context which is covered by that and subsequent pages of the Record reveals that at no time does the trial court make a factual finding or legal determination that the Appellee and his hand held suit bag were legally detained. (T. 152-156). Instead what such a review of the Record reveals is that the trial court, in an attempt to accomodate the prosecutor in his legal argument, assumed arguendo that the police had the right to detain Appellee. (T. 152-156). The trial court never actually determined that the police legally stopped Appellee or had the right to do so.

Even assuming arguendo that the trial court made a factual finding and legal determination that the police had the right to detain Appellee, there is not even a scintilla of evidence in the Record to support such a conclusion. As noted earlier, it is Appellant's responsibility to provide a complete record. Dade County Board of Public Instruction v. Foster, 307 So.2d, at 502. Appellant at best merely cites to the alleged conclusion of the trial court, but Appellant cites to no evidence in the Record that even establishes why Appellee was detained,

---

[14]Appellant again complains that "[A]ppellee has not appealed that ruling." (Brief of Appellee [sic] at 11). See, p. 7, supra.

NO.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
Attorney General

CALVIN L. FOX
Assistant Attorney General
401 N.W. 2nd Avenue
(Suite 820)
Miami, Florida 33128
(305) 377-5441

Page(s) Missing from
Filming Copy

was granted; extensive briefs of the parties were submitted and oral argument was subsequently heard on April 14, 1980. On September 9, 1980, in a split opinion, the District Court reversed the panel opinion and the trial court.

The en banc decision herein is identical in its structure to the dissent to the panel opinion and is authored by the dissent to the panel opinion. Indeed, the facts relied upon by the en banc court are no different than those stated above. except that the en banc court infers (on a defense appeal) from the barren record that the Defendant's ticket and license were not returned. Id at 1018. Such a factual finding and question was never presented to the trial court. This also of course, also ignores any issue of articulable suspicion to conduct a brief investigation. The fundamental position of the en banc court was simply a reweighing and different view of the facts.

The fundamental error in the en banc court reversal herein is reflected in its view of the factual question of consent found by the trial court and affirmed by the panel opinion. The en banc court opinion refers to the factual finding of consent by the trial court as THE "ALLEGED CONSENT." Id at 1019. Citing Frost, infra, the District Court's en banc opinion then takes the view that any movement from the airport concourse to the room forty (40) feet away under Dunaway was an arrest. Id 1018-1019. The Court ignores any possibility of a brief detention of the Respondent for investigation by stating that the alias used by the Defendant was not a suspicious circumstance in the experience of the Court[2]. 389 So.2d at

---

2. The District Court's en banc decision and outright rejection of Johnson's experience and factual observations is absolutely refuted by the record. THE DEFENDANT WAS NERVOUS ABOUT SIXTY-FIVE (65) POUNDS OF MARIJUANA!! He was travelling under an alias to avoid detection!

United States v. Mendenhall, __U.S.___, 100 S.Ct. 1870 (1980) is contra. 389 So. 2d 1019 and 1017 n. 6. The Court concluded without viewing the facts reached by the trial court as sustained by the panel, that because the Respondent was illegally detained, his consent was therefore, automatically invalid. Id at 1018. The Court stated that there was no precedent to sustain the trial court. But see, e.g., United States v. Mendenhall, supra. On September 24, 1980, the State filed its Motion for Rehearing and Motion for Certification noting the grevious error in the en banc decision. On October 21, 1980, the State's Motion for Rehearing was denied. On March 18, 1981, the Florida Supreme Court with Justices Alderman and Adkins dissenting, denied the State's application for review of the Florida District Court's en banc decision. Al.

83-683

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

GERALD BANKSTON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

RESPONSE OF RESPONDENT STATE OF FLORIDA

IN OPPOSITION TO PETITION FOR CERTIORARI

JIM SMITH, Esq.
Attorney General

WILLIAM P. THOMAS, Esq.
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue - Suite 820
Miami, Florida 33128
(305) 377-5441

QUESTION PRESENTED FOR REVIEW

WHETHER THE PETITIONER HAS RAISED AN UNRESOLVED SUBSTANTIAL QUESTION OF FEDERAL LAW WARRANTING REVIEW BY THIS HONORABLE COURT?

PARTIES TO THE PROCEEDING

Respondent accepts the designations of parties appearing on the face of the Petition.

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(CONT'D)

STATUTE

PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the opinion in the court below and the Constitutional and Statutory Provisions Involved found on pages 1, 4 and 5 of the Petition.

JURISDICTION

The Respondent cannot accept Petitioner's assertion that this court's jurisdiction has been properly invoked pursuant to 28 U.S.C. §1257(3), in that the Petitioner has failed to present an unanswered substantial federal question entitling him to this court's exercise of its jurisdiction. Specifically, Petitioner's QUESTION I, subparts A., B., and C., have all finally been resolved by this Honorable Court's opinion of United States v. Place, __U.S.__, 103 S.Ct. 2637 (1983), which to a large extent resolves any lingering inquiries on the framed issues, post, Florida v. Royer, 460 U.S.___, 103 S.Ct. 1319 (1983). Indeed, in some respects the majority opinion in United States v. Place, supra, can be seen as the logical successor of the plurality

opinion in Florida v. Royer, supra. See 103 S.Ct. at 2648 (BRENNAN, J., concurring in result).

Petitioner's framed QUESTION II totally fails to present an unresolved substantial federal question as, beyond rational argument to the contrary, law enforcement officers under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2nd 889 (1968), and its progeny, bear the burden of articulating reasonable suspicion in order to justify the temporary detention of any citizen for further investigation of suspected criminal activity. Petitioner suggests that the ruling of the lower court in the case sub judice is in conflict with the principles of Terry and its progeny, in that the instant decision "...reliev[es] the State of Florida of its burden to es-

tablish reasonable suspicion in order to justify detention of a person and his hand-held luggage". See Petitioner's Brief, p. ii.

Petitioner boldly asserts such an alleged conflict despite a finding by the District Court of Appeal of Florida, Third District, that there "...were...more than sufficient [facts] to engender the founded suspicion of criminal conduct which was required to justify [appellant's] detention". See State v. Bankston, 435 So.2d 269 (Fla. 3d DCA 1983) at 270, and n. 4.

As the instant Petition fails to raise any unresolved substantial federal question justifying the invocation of jursidiction pursuant to 28 U.S.C. §1257 (3), the granting of this Honorable Court's

most gracious writ is both unnecessary and unwarranted.

STATEMENT OF THE CASE AND FACTS

The Respondent does not accept the Statement of the Facts as presented by the Petitioner and would tender the following facts as set forth by the District Court of Appeal of Florida, Third District, in its opinion of State v. Bankston, 435 So.2d 269 (Fla. 3d DCA 1983);

> "...two plainclothes narcotics officers, Johnson and Dozier, became interested in Bankston and his companion, Peterson, when they appeared 'extremely nervous' in the airport. When they 'approached' the appellee, ...as he was nearing his departure date, and asked for his ticket and identification, Bankston voluntarily complied. The names on the two documents did not match. Johnson then asked permission to look inside a suit bag he was carrying. When the

defendant asked him what he was after, Johnson stated he and his partner were narcotics officers, looking for drugs. Bankston at once became faint and asked to sit down. After he was taken to a nearby seating area, the defendant then asked 'if I have something, why don't you let me flush it down the john?, to which Johnson responded that if all he had was a 'head stash, that we would indeed likely allow' him to do so. At that point, Bankston was informed he was being 'detained.'

He and Peterson were again asked to consent to a search of their check and carry-on baggage. Although Peterson agreed, Bankston did not, and Johnson, as he indicated, went to secure a narcotics dog from its pen on the apron of the airport. When the dog arrived some 5-15 minutes later, he alerted on the suit bag which had been moved a foot or two away from Bankston to accommodate the sniff. Based upon the probable cause which had thus arisen,

> [citations ommitted], the defendant was arrested and a search warrant secured for the bag. When executed, 185 grams of cocaine were found inside. 435 So.2d at 269-270.

In addition to the foregoing facts, the Respondent specifically rejects Petitioner's plenteous characterization of the narcotics detection dog as 'aggressive', 'violent' and 'dangerous', as such characterizations are an overreaching of the facts. See Petitioner's Brief p.p.,i, 21, 23, 24, 25, 26, 28, 30, 31, 37, 52.

REASONS THE WRIT SHOULD NOT BE GRANTED

In the case sub judice, upon a finding of founded suspicion, the police officers stopped and detained the Petitioner and his travelling companion for the purposes of conducting a limited investigation of criminal narcotics trafficking. When the Petitioner declined a consensual search of his hand-held luggage, the police officers summoned a narcotics detection dog for the purposes of "sniffing" the luggage for narcotics. The total period of detention was between 5 and 15 minutes with Petitioner's hand-held luggage resting on the ground within two feet of the Petitioner.

The Petitioner assails this procedure as being violative of the Fourth and Fourteenth Amendments to the United States Constitution, stoutly arguing such a sniffing

procedure constitutes an impermissible search by state authorities in derogation of the aforementioned amendments. United States v. Place, supra, has held directly contra to Petitioner's suggested argument. Id at 2644 and 2645. See also, United States v. Viera, 644 F.2d 509 (5th Cir. 1981). The Petitioner fails to suggest any valid or substantial argument for the position that this court should now revisit that ruling.

Petitioner also suggests that the temporary and limited detention of a person, upon a finding of articulable and founded suspicion, in order to accomplish the sniffing of the individual's hand-held luggage, constitutes an impermissible seizure within the meaning of the Fourth and Fourteenth Amendments. The Respondent's

rejoinder to such an argument is again grounded in this court's opinion of United States v. Place, supra.

In Place, while the court rejected as impermissible and unreasonable a detention of 90 minutes, the court clearly recognized the concept and constitutional validity of a limited investigative detention of a suspect's person and luggage in his personal custody, on less than probable cause, measured by a Terry-type investigative stop standard:

> In sum, we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry and its progeny would permit the officer to detain the luggage briefly to investigate

> the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope. Id at 2644.

In Florida v. Royer, supra, not only did a plurality of this court suggest that such a limited investigative detention and procedure was constitutionally permissible, but also desirable in balancing the constitutional protections of citizens and the state's legitimate interest in the suppression of narcotics trafficking:

> Third, the State has not touched on the question whether it would have been feasible to investigate the contents of Royer's bags in a more expeditious way. The courts are not strangers to the use of trained dogs to detect the presence of controlled

> substances in luggage. There is no indication here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out. Indeed, it may be that no detention at all would have been necessary.
>
> Id at 1328-9

What was clearly and unequivocally intimated by the plurality in Florida v. Royer was expanded upon by the majority in United States v. Place:

> A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in

> which information is obtained through this investigative technique is much less intrusive than a typical search.
>
> * * *
>
> In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Id at 2644

Accordingly, in light of United States v. Place, supra, and Florida v. Royer, supra, no new substantial federal question has been presented by Petitioner in this area via his Petition for Writ of Certiorari.

Finally, Petitioner suggests this Honorable Court should grant review of the state appellate court's opinion in the case sub judice on an alleged ground of a factual deficiency for a finding of founded suspicion, and an additional barebones allegation that the Respondent employed "dangerous, violent, unleashed and aggressive" dogs during the course of the investigative "sniffing" procedure.

As previously pointed out, the state appellate court found at the very least the requisite founded suspicion from the facts of the case and suggested, without deciding, that such facts may have even given rise to full probable cause. State v. Bankston, 435 So.2d at 270; See also n. 4.

The Petitioner's suggestion that the Respondent employed unnecessarily violent and physically dangerous dogs for the sniffing procedure, comes from a resourceful interpretation of the fact that the narcotic detection dog alerted to petitioner's bag by "...scratching [at the bag] with his muzzle down at the bag". T-53. There is nothing in the record to even remotely suggest that the petitioner was ever exposed to unreasonable physical danger by the procedure.

Accordingly, this Honorable Court ought to decline review on the aforementioned grounds.

CONCLUSION

Based upon the foregoing reasons, ument and citations of authority, the ition for Writ of Certiorari to the strict Court of Appeal of Florida, Third strict, should be denied.

Respectfully submitted,

JIM SMITH
Attorney General

WILLIAM P. THOMAS
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue
Suite 820
Miami, Florida 33128

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE'S RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI was furnished by depositing in the United States Post Office to Steven D. Ginsburg, 1570 Madruga Avenue, Coral Gables, Florida 33146-3075, Penthouse Suite on this _____ day of January, 1984.

WILLIAM P. THOMAS
Assistant Attorney General